



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HDI



HL 4955 I



HARVARD LAW SCHOOL
LIBRARY

GIFT OF

Squire R. Ogden

67
Kentucky. Laws, statutes, etc. - Code, Procedural.

CIVIL AND CRIMINAL

Mar 15
c#

CODES OF PRACTICE

OF KENTUCKY.

WITH

NOTES OF DECISIONS OF THE COURT OF APPEALS TO JANUARY, 1895.

Amendments and Acts relating to Codes to January, 1895.

1895
Edited by JOHN D. CARROLL.

LOUISVILLE:
THE COURIER-JOURNAL JOB PRINTING COMPANY, PUBLISHERS.
1895.

KY.
132.11
.885.875.1

COPYRIGHT 1895,
BY COURIER-JOURNAL JOB PRINTING CO.

PREFACE.

This edition of the Codes contains all amendments, and notes of decisions to January, 1895, including cases reported in 95 Ky. and 16 Ky. Law Reporter. Unreported decisions of the Court of Appeals found in the Ky. Law Reporters bearing upon sections of the Codes have also been inserted.

An index in the middle of a book seems out of place, and I have put indexes to both Codes, as well as forms, at the end of the volume.

The catch words to sections, the indexes and the notes have been revised, rewritten and made more complete, and many forms not in former editions have been added.

In an appendix will be found the sections of the Kentucky Statutes relating:

1. To the jurisdiction of all courts in the State.
2. To courts having four judges.
3. To courts having continuous sessions.
4. Selection of special judges.
5. Changes of venue in civil and criminal cases.

Also the laws of the United States relating to the Removal of Actions and Prosecutions to the United States Courts, and the Rules adopted by the Court of Appeals of Kentucky.

In the citation of cases I have not assumed to criticise or comment, nor undertaken to say what the Court of Appeals will decide when it comes to construe sections not heretofore passed upon, but have contented myself with stating the law as I have found it in the cases. My observation has been that the court does not always adopt the views of the commentator, and that expressions of opinion are more misleading than useful.

The Kentucky Statutes contains the general laws of the State not found in the Codes, and the relation between the Statutes and Codes is so intimate that I have in every instance where either a section of the Codes or a note thereto contained any reference to the Statutes, or any section of the Statutes had any bearing on the Codes, cited and noted the section of the Statutes applicable.

JOHN D. CARROLL.

NEW CASTLE, KY., March, 1895.

TABLE OF CONTENTS.

CIVIL CODE AND NOTES, pages 17 to 388.

CRIMINAL CODE AND NOTES, pages 391 to 545.

✓ **APPENDIX**, pages 547 to 595.

FORMS IN CIVIL CASES, pages 596 to 651.

FORMS UNDER CRIMINAL CODE, pages 652 to 679.

INDEX TO CIVIL CODE, pages 681 to 756.

INDEX TO CRIMINAL CODE, page 757.

CONTENTS OF CIVIL CODE.

TITLE I.

	PAGE.
PRELIMINARY PROVISIONS	17

TITLE II.

FORM OF CIVIL ACTIONS	17
---------------------------------	----

TITLE III.

PARTIES TO CIVIL ACTIONS	25
CHAPTER I. Parties to actions generally	25
CHAPTER II. Parties to certain actions	34
CHAPTER III. Actions concerning married women	36
CHAPTER IV. Persons under disability, provisions concerning	37

TITLE IV.

COMMENCEMENT OF A CIVIL ACTION	42
CHAPTER I. Manner of commencing an action	42
CHAPTER II. Service of summons	44
Art. 1. Actual service	44
Art. 2. Constructive service	50

TITLE V.

THE COUNTY IN WHICH AN ACTION MUST OR MAY BE BROUGHT	55
--	----

TITLE VI.

JOINDER OF ACTIONS	64
------------------------------	----

TITLE VII.

	PAGE.
PLEADINGS IN CIVIL ACTIONS	67
CHAPTER I. The pleadings in general	67
CHAPTER II. The petition	68
CHAPTER III. The demurrer	73
CHAPTER IV. The answer, counter-claim, set-off, cross-petition	77
CHAPTER V. The reply and additional pleadings	88
CHAPTER VI. Time of pleading	89
CHAPTER VII. General rules of pleading	91
CHAPTER VIII. Mistakes in pleadings and amendments	102
CHAPTER IX. Interrogatories	100

TITLE VIII.

PROVISIONAL REMEDIES	112
CHAPTER I. Arrest and bail	112
<i>Art.</i> 1. When and how an order of arrest may be obtained	112
<i>Art.</i> 2. Proceedings upon an order of arrest	114
<i>Art.</i> 3. Liability and discharge of bail, and of officer	116
<i>Art.</i> 4. Motion to vacate an order of arrest	118
CHAPTER II. Claim and delivery of personal property	119
CHAPTER III. Attachment	125
<i>Art.</i> 1. General attachments	125
<i>Art.</i> 2. Attachments in certain actions	148
<i>Art.</i> 3. Specific attachments	151
<i>Art.</i> 4. Discharge and reinstatement of attachments	153
CHAPTER IV. Injunction	156
<i>Art.</i> 1. When and how an injunction may be obtained	156
<i>Art.</i> 2. Dissolution and reinstatement of injunctions	164
CHAPTER V. Receiver	168
CHAPTER VI. Deposit in court	170

TITLE IX.

TRIAL AND JUDGMENT	172
CHAPTER I. Issue	172
CHAPTER II. Trial	173
<i>Art.</i> 1. Trial in general	173
<i>Art.</i> 2. Trial by jury	175
<i>Art.</i> 3. Trial by the court	184
<i>Art.</i> 4. Exceptions	185
<i>Art.</i> 5. New trials	193

CONTENTS OF CIVIL CODE.

11

	PAGE.
<i>Art.</i> 6. General provisions	200
<i>Art.</i> 7. Time of trial	201
CHAPTER III. Judgment	205
<i>Art.</i> 1. Judgment in general	205
<i>Art.</i> 2. Judgment upon failure to answer	211
<i>Art.</i> 3. Judgment by confession	212
<i>Art.</i> 4. Manner of giving and entering judgment	213
<i>Art.</i> 5. Conveyance by commissioners	216
CHAPTER IV. Revivor of judgments	218

TITLE X.

PROCEEDINGS IN CERTAIN ACTIONS	221
CHAPTER I. Actions against absent and unknown defendants	221
CHAPTER II. Alimony and divorce	226
CHAPTER III. Settlement of trust estates and estates of deceased persons	230
CHAPTER IV. Enforcing the satisfaction of judgments	236
CHAPTER V. Summary proceedings	239
CHAPTER VI. Civil proceedings on behalf of the Commonwealth	241
CHAPTER VII. Arbitrations and awards	241
CHAPTER VIII. Forcible entry and detainer	244
CHAPTER IX. Probate of wills	252
CHAPTER X. Settlement of accounts of fiduciaries, by the county court	252
CHAPTER XI. Caveats	253
CHAPTER XII. Writs of mandamus and prohibition	255
CHAPTER XIII. Repealing or vacating charters, and preventing the usurpation of an office or franchise	258
CHAPTER XIV. Sales of real property of persons under disability	260
CHAPTER XV. Division of land and allotment of dower	270

TITLE XI.

REVIVOR OF ACTIONS	274
-------------------------------------	------------

TITLE XII.

PROCEEDINGS TO REVERSE, MODIFY OR VACATE JUDGMENTS	279
---	------------

TITLE XIII.

EVIDENCE	286
PART I. PRODUCTION OF EVIDENCE	286
CHAPTER I. By whom to be produced	286

	PAGE.
CHAPTER II. Means of production	287
CHAPTER III. Mode of taking testimony	291
<i>Art.</i> 1. Affidavit	291
<i>Art.</i> 2. Deposition	293
<i>Art.</i> 3. General rules of examination	304
PART II. COMPETENCY OF WITNESSES	309
PART III. PERPETUATION OF EVIDENCE	315

TITLE XIV.

MISCELLANEOUS PROCEEDINGS	317
CHAPTER I. Security for costs	317
CHAPTER II. Motions and notices	319
CHAPTER III. Offer to compromise	321
CHAPTER IV. Submitting a controversy	322
CHAPTER V. Offer to confess judgment	323
CHAPTER VI. Proceedings upon executions and distress-warrants	324
CHAPTER VII. Proceedings by sureties	332

TITLE XV.

GENERAL PROVISIONS	333
CHAPTER I. Process	333
CHAPTER II. Duties of clerks	335
CHAPTER III. Duties of sheriffs	336
CHAPTER IV. Miscellaneous provisions	337

TITLE XVI.

QUARTERLY COURTS, POLICE COURTS, CITY COURTS, MAYORS'	
COURTS AND COURTS OF JUSTICES OF THE PEACE	348
CHAPTER I. Mode of proceeding in	348
CHAPTER II. Appeals from their judgments	354

TITLE XVII.

RULES OF CONSTRUCTION OF THIS CODE	358
--	-----

TITLE XVIII.

APPEALS TO THE COURT OF APPEALS	361
CHAPTER I. How granted	361
CHAPTER II. Supersedeas on appeals	374
CHAPTER III. Trial and decision	379
CONCLUDING PROVISIONS	388

CONTENTS OF CRIMINAL CODE.

	PAGE.
PRELIMINARY PROVISIONS	391

TITLE I.

PUBLIC OFFENSES, AND THE MODES OF PREVENTING AND PROSECUTING THEM	392
---	-----

TITLE II.

CRIMINAL JURISDICTION OF THE COURTS OF THE STATE	394
--	-----

TITLE III.

PROCEEDINGS FOR THE ARREST OF CRIMINALS	400
CHAPTER I. Warrant of arrest	400
CHAPTER II. Arrest, by whom and how made	403

TITLE IV.

PROCEEDINGS IN THE EXAMINING COURT	407
--	-----

TITLE V.

BAIL	415
CHAPTER I. Admission to bail	415
CHAPTER II. Surrender of the defendant	420
CHAPTER III. Deposit of money, in lieu of bail	421
CHAPTER IV. Forfeiture of bail	422
CHAPTER V. Recommitment after giving bail, or depositing money . .	426

TITLE VI.

TRIAL	427
CHAPTER I. Grand jury, its powers and duties	427
CHAPTER II. Indictment	431
Art. 1. The finding of an indictment	431
Art. 2. Form and requisites of an indictment	432

	PAGE.
CHAPTER III. Process upon an indictment	447
CHAPTER IV. Production of evidence	449
CHAPTER V. Arraignment, and pleadings by the defendant	451
CHAPTER VI. Trial	460
<i>Art.</i> 1. Mode of trial	460
<i>Art.</i> 2. Time of trial	462
<i>Art.</i> 3. Postponement of trial	462
<i>Art.</i> 4. The jury	465
<i>Art.</i> 5. Conduct of the jury trial	471
<i>Art.</i> 6. Verdict	493
CHAPTER VII. New trial and arrest of judgment	498
CHAPTER VIII. Bills of exception	501
CHAPTER IX. Judgment	503
CHAPTER X. Execution	505

TITLE VII.

PROCEEDINGS IN POLICE OR CITY COURTS	508
--	-----

TITLE VIII.

PROCEEDINGS IN JUSTICES' COURTS	511
---	-----

TITLE IX.

APPEALS	513
CHAPTER I. To the Court of Appeals	513
<i>Art.</i> 1. In felonies	513
<i>Art.</i> 2. In misdemeanors	520
<i>Art.</i> 3. General provisions	523
CHAPTER II. To circuit courts	524

TITLE X.

PROCEEDINGS TO PREVENT THE COMMISSION OF OFFENSES	527
CHAPTER I. Suppression of riots, and of resistance to lawful authority,	527
CHAPTER II. Requiring security to keep the peace, or for good behavior	530
CHAPTER III. Arrest and confinement of insane, drunken, and disorderly persons	533
CHAPTER IV. <i>Habeas corpus</i>	534

TITLE XI.

IMPEACHMENT	541
-----------------------	-----

TITLE XII.

PAGE.

PROCEEDINGS FOR THE REMOVAL FROM OFFICE OF CLERKS OF COURTS	543
--	-----

APPENDIX.

Jurisdiction of courts	547
Courts having continuous sessions	557
Courts having four judges	563
Special judges	569
Change of venue	571
Removal of actions to United States courts	580
Rules of Court of Appeals	593
<i>Forms under Civil Code</i>	596
<i>Forms under Criminal Code</i>	652
<i>Index to Civil Code</i>	681
<i>Index to Criminal Code</i>	757

THE CIVIL CODE OF PRACTICE.

TITLE I.

PRELIMINARY PROVISIONS.

- § 1. Civil cases defined.
- § 2. Civil actions defined.
- § 3. Special proceedings.

§ 1. **Civil cases defined.** Civil cases are actions or special proceedings.

§ 2. **Civil actions defined.** A civil action is a demand, by pleadings, in a court of justice, for the enforcement of an alleged right of a plaintiff against a defendant. (*"Action" further defined, sec. 732-34.*)

§ 3. **Special proceedings.** Every other civil case is a special proceeding.

TITLE II.

FORM OF CIVIL ACTIONS.

- § 4. Form of action.
- § 5. Kinds of actions.
- § 6. Action—when to be equitable; when ordinary.
- § 7. Lost or mutilated writing—action on.
- § 8. Error as to form of action may be corrected.
- § 9. Error—how corrected.

§ 2. (1) **Civil actions.** See note 1 to sec. 3.

(2) **Provisional remedy**, such as an attachment or injunction is not a cause of action, it is merely ancillary or incidental to the action in which it is sought, and can only be obtained in the court in which the action was brought or is pending at the time it is sought. *Moore v. Sheppard*, 1 Met. 97.

§ 3. (1) **Special Proceedings.** The word "action" embraces special proceedings. Sec. 732-34. In the absence of any special authority for a summary remedy the

(2)

party must resort to a civil action for the enforcement and protection of his private rights. *Gay v. Morgan*, 4 Bush 606, and it is only in cases where a specific remedy is provided by statute that rights can be enforced otherwise than by civil action. *Stephens v. Miller*, 80 Ky. 47; *Kinney v. O'Bannon*, 6 Bush 692. For some of the cases in which summary proceedings may be resorted to, see sec. 444. *Veach v. Wickersham*, 11 Bush 261.

(2) Claimants' bond for property levied on under execution—motion for judgment on, as provided in sec. 449, is a

- § 10. Transfer of actions from one docket to the other.
- § 11. Ordinary action—how transferred to equity—practice.
- § 12. Equitable action—how transferred to ordinary—practice.
- § 13. Transfer of actions from one court to another.
- § 14. Bond may be required before ordinary action transferred.
- § 15. Waiver of error as to form of action—"exception."
- § 16. Provisions of Code apply to all civil actions.
- § 17. Ordinary judgment—when corrected in equity.

§ 4 [1] **Form of action.** There shall be but one form of action.

§ 5 [2] **Kinds of actions.** Actions are ordinary or equitable.

§ 6 [4, 5] **Action—when to be equitable; when ordinary.** Unless otherwise provided by this Code or other statute—

1. Actions of which courts of chancery had jurisdiction before the first day of August, 1851, may be equitable; and actions of which such jurisdiction was exclusive must be equitable.

2. All other actions must be ordinary.

*Ann. Eq. Jan.
1872.*

special or summary proceeding. *Couchman v. Maupin*, 78 Ky. 33; *Watson v. Gabby*, 18 B. M. 658.

(3) Bastardy case is a civil or special proceeding, the chief object of which is the benefit of the mother and child. *Francis v. Com.*, 3 Bush 4; *Chandler v. Com.*, 4 Met. 66; *Runner v. Com.*, 78 Ky. 556.

(4) Proceeding to enforce a forfeited recognizance or bond is a civil proceeding. *Com. v. Hughes*, 13 Bush 349.

§ 4. **Forms not substance abolished by Code;** and the pleader must state in ordinary and concise language the facts constituting the cause of action, every fact necessary to enable the plaintiff to recover must be alleged, and every essential allegation required to make a declaration good at common law upon demurrer must be made. The facts must be alleged so as to enable the opposite party to know what is meant to be proved, and also that an issue may be formed in regard to the subject matter in dispute and to enable the court to pronounce the law upon the facts stated. *Louisville Canal Co. v. Murphy*, 9 Bush 522; *Stivers v. Baker*, 87 Ky. 508; *Murphy v. Estes*, 6 Bush 532; *Huffaker v. Nat. Bank*, 12 Bush 287.

§ 6 (1) **Distinction between courts of equity and courts of law** has not been

abolished by the Code, but if an action be brought in equity when it should have been in ordinary, or *vice versa*, it shall not on that account be dismissed, but transferred to the proper docket. *Fraley v. Peters*, 12 Bush 469; and see sec. 8.

(2) **Equitable and ordinary actions defined.**

The pleadings in equitable and ordinary actions are the same, except that a petition in equity must be described by the words "petition in equity." Sec. 110-2. Without attempting to state fully what actions should be equitable and what ordinary, it may be stated that equity has jurisdiction of actions on return of "no property" and for discovery, sec. 439; by surety against principal before debt matures, sec. 237, and after maturity of debt, sec. 661; for sale of real property of infants and persons of unsound mind, sec. 489, and of joint owners, sec. 490; to settle trust estates and estates of deceased persons, sec. 428; to grant divorces and for alimony, sec. 420; to grant injunctions, sec. 271; to partition land and allot dower, sec. 499; to enforce liens on real and personal property. Actions for assault and battery, assumpsit, covenant, debt, to recover possession of real estate and specific personal property, or for fraud or deceit in the sale of property, or for malicious prosecution, or seduction, or slander, or

Maynard v. Audenon
106 U.S. 672.

§ 7 (6) Lost or mutilated writing—action on. An ordinary or equitable action may be brought upon a bill of exchange, or a note or other obligation, or upon an indorsement or assignment thereof, which, or upon a judgment the record of which, is lost, destroyed, mutilated, or defaced, without fraud on the part of the plaintiff, or of those under whom he claims. But no action shall be brought upon an instrument transferable by delivery, merely, which is alleged to be lost, destroyed, mutilated, or defaced, without a previous tender by the plaintiff to the defendant, if his name and place of residence be known to the plaintiff, of an indemnifying bond, with good surety; nor shall judgment be given against the defendant, in such action, until such bond is given, with good surety approved by the court. (*Form of bond, page 625.*)

§ 8 (7) Error as to form of action may be corrected. An error of the plaintiff as to the form of action shall be cause, not for the abatement or dismissal of it, but merely for a change into the proper proceedings by an amendment of the pleadings and a transfer of the action to the proper docket.

§ 9 (8) Error—how corrected. The error mentioned in the last section may be corrected by the plaintiff, without motion, at any time before the defendant answers, or afterward by leave of court.

§ 10 (9) 1. Transfer of actions from one docket to the other. The defendant,

libel, or trespass, or to recover rent, should be brought in ordinary. Newman's Pleading and Practice.

(3) **Relief in equity.** If a party may maintain a common law action for damages for an injury to property, he may, in a proper state of case, resort to equity to prevent the injury. *Greenup Co. v. M. & B. S. R. Co.*, 88 Ky. 659.

§ 7. (1) Bond of indemnity. This section applies to bank notes. *Commercial Bank v. Benedict*, 18 B. M. 307. The bank having denied its liability, the preliminary execution of the bond was not necessary, its execution before judgment being sufficient. *Id.*

(2) Judgment for the amount of a note held by a non-resident adverse claimant, without a bond of indemnity being executed, was held erroneous. *Berry v. Berry*, 6 Bush 594.

§ 8. (1) Error as to form of action—how corrected. When the court has jurisdiction,

an error as to the form of action adopted does not authorize a dismissal; it should be transferred to the proper docket. *Lansdale v. Mitchell*, 14 B. M. 348; *Foster v. Watson*, 16 B. M. 377; 15 B. M. 168; 1 Met. 593; 12 Bush 469. And advantage must be taken of the error by a motion to transfer to proper docket. *Greenup Co. v. M. & B. S. R. Co.*, 88 Ky. 659.

(2) **Practice—amendment.** In an ordinary action to recover possession of property, a lien can not be enforced without an amendment asking that relief and a transfer to equity. *Hewman v. Whitescarver*, 89 Ky. 633; and see *Walker v. Leslie*, 90 Ky. 642.

§ 9. Motion to transfer to ordinary is equivalent to an objection to a trial by the chancellor, and if motion is improperly overruled it is a reversible error. *Walker v. Leslie*, 90 Ky. 642.

§ 10. (1) Judgment of chancellor—how treated in action at law. When an ordinary

by motion made when he answers, may have an equitable action transferred to the ordinary docket, if, according to the provisions of section six, it should have been an ordinary action, and if the answer present a defense of which he is entitled to a jury trial.

2. The defendant, by motion made when or before he answers, may have an ordinary action transferred to the equity docket, if, according to the provisions of section six, it should have been an equitable action.

3. The court may, without motion, order the transfer of an action from one docket to another if either party be entitled to such transfer; or may try the action, or render judgment therein by default, unless a party entitled to a transfer move therefor.

4. [The court may, in its discretion, on motion of either party, or without motion, order the transfer of an action from the ordinary to the equity docket; or from a court of purely common law to a court of purely equity jurisdiction, whenever the court before which the action is pending shall be of the opinion that such transfer is necessary because of the peculiar questions involved, or because the case involves accounts so complicated or such great detail of facts as to render it impracticable for a jury to intelligently try the case.] (*Words in brackets inserted by act of 1890.*)

action is submitted to the chancellor or heard by him without objection, his judgment will be treated as the verdict of a properly instructed jury, and, unless palpably against the evidence, will be sustained. *P. C. & St. L. R. R. Co. v. Woolley*, 12 Bush 451; *Walker v. Leslie*, 90 Ky. 642; *Judge v. Braswell*, 13 Bush 67; *Moore v. Estes*, 79 Ky. 282; *Whitlock v. Ledford*, 82 Ky. 390; 87 Ky. 30; 12 Bush 469.

(2) **Legal issues in equity action.** In an equitable action, if the defense presents an issue proper for a jury to try and action is not transferred, the chancellor should dispose of all the issues presented, or submit the legal issues to a jury. *Frazier v. Naylor*, 1 Met. 593; *Sale v. Crutchfield*, 8 Bush 636. Defendant is entitled to have legal issues tried by a jury. *Meek v. McCall*, 80 Ky. 371, and see notes to sec. 12.

(3) **Matters of account.** A court of equity has concurrent jurisdiction in

matters of account where they are of such a complex nature as to render the remedy at law inadequate, and this jurisdiction should be exercised where there is a serious doubt as to the true state of the accounts or there is difficulty in adjusting them. *O'Connor v. Henderson Bridge Co.*, 95 Ky. 638; and see 78 Ky. 435.

(4) **Practice—bill of exceptions.** When an ordinary action is brought and heard in equity the court will treat the evidence copied and certified by clerk as part of record without a bill of exceptions. *Fraley v. Peters*, 12 Bush 469.

(5) **Waiver of objection to form of action.** If an action at law is brought in equity, and neither party moves to transfer, and it is not transferred by the court, it is the duty of the court to render judgment according to the rights of the parties. *Ky. Mut. Co. v. Turner*, 89 Ky. 665; and its judgment on the facts will be treated as the verdict of a jury by the Court of Appeals. *Fraley v. Peters*, 12 Bush 469.

§ 11 [110] **Ordinary action—how transferred to equity—practice.** In an ordinary action properly commenced as such—

1. If there be several issues, all of which were, before the first day of August, 1851, cognizable in chancery, though none was exclusively so, either party may, by motion, have the case transferred to the equity docket.

2. Either party may, by motion, have the case transferred to the equity docket for the trial of any issue which, before the said day, was exclusively cognizable in chancery.

3. If there be an issue which was not cognizable in chancery, and an issue which was exclusively cognizable in chancery, before the said day, the plaintiff may have the former issue tried before the latter is disposed of.

4. If there be an issue which was not cognizable in chancery, and an issue which was cognizable in chancery, but not exclusively so, before the said day, the case shall not be transferred to the equity docket without consent of the parties.

§ 11. (1) **Defendant not entitled to transfer** of an ordinary action, properly commenced as such, unless the answer presents a valid equitable defense. *Jones v. Letcher*, 13 B. M. 363, but see amendment to sec. 10, and note 3 thereto.

(2) **Equitable defense.** When an answer filed in an ordinary action contains a valid equitable defense, no judgment can be rendered until some disposition is made of the answer, and in such case the action should be transferred to equity. *Bosley v. Mattingly*, 14 B. M. 89; *Harreld v. Howard*, 80 Ky. 51.

(3) **Equitable and legal defense.** If the answer to an ordinary action presents an equitable and a legal defense, the equitable issue should be tried by the court and the legal issue referred to a jury, unless a jury is waived. Both issues should be disposed of before judgment. *Smith v. Moberly*, 15 B. M. 70; *Petty v. Malier*, 15 B. M. 591; *Geoghegan v. Ditto*, 2 Met. 433; *Bennett v. Titherington*, 6 Bush 192.

(4) Where legal and equitable issues are formed in an ordinary action, the court should transfer only the equitable issue to equity, because if the equitable defense fail, the defendant is entitled to

a jury to try the legal issue; but if the equitable issue is a complete defense to the action, the refusal to submit legal issue to a jury is not error. *Wimmer v. Ficklin*, 14 Bush 193.

(5) **Error in transferring ordinary action.** If the plaintiff in an ordinary action is entitled to a jury trial, it is error to transfer action to equity, and he is not concluded by the judgment dismissing his petition, although he failed to take proof to support his cause of action. *Creager v. Walker*, 7 Bush 1; nor does a party waive his right to a trial by jury by consenting to a transfer so that certain issues may be tried with a pending equitable action. *Betz v. Newport P. M. A.*, 6 R. 222.

(6) The constitution guarantees a jury trial, and a party can not be deprived of that right by converting a legal right into an equitable one or by giving the chancellor an exclusive right to try legal issues because there is some equitable right that arises out of them. *Carder v. Weisenburgh*, 95 Ky. 135; *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633; 78 Ky. 435.

(7) **Failure to transfer** an action properly brought at law to equity for the

§ 12. Equitable action—how transferred to ordinary—practice. In an equitable action, properly commenced as such, either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer.

§ 13. Transfer of actions from one court to another. In counties wherein the jurisdiction of circuit courts is vested in different courts—

1. The provisions of this chapter, concerning transfers to the proper docket, apply to transfers to the proper court.

2. Upon an order for the transfer of an action from one court to another, the papers in the action and a copy of the order shall be delivered by the clerk of the court which makes the order to the clerk of the court to which the action is transferred; and it shall proceed as if it had been brought in the latter court. (*Transfer of attachments, sec. 210.*)

§ 14 (11) Bond may be required before ordinary action transferred. In an

purpose of having alleged mistakes corrected, is not a reversible error when the case is disposed of by the judge in the same manner as if it had been tried by the chancellor. *Mullins v. Pendleton Co.*, 6 R. 508.

§ 12. (1) Issue out of chancery. If the issue involved in an equitable action is purely a legal one, and the equitable right depends upon the decision of such issue, the case, on motion, must be transferred for a jury trial, and the court has no discretion in the matter; but if the case is purely equitable, the court may or may not, in its discretion, obtain the advisory aid of a jury as to an issue of fact. *Carder v. Weisenburgh*, 95 Ky. 135; *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633; *Hill v. Phillips*, 87 Ky. 169; the matter of referring questions of fact in equity case to a jury in aid of the chancellor is always addressed to his discretion, and this court will not undertake to control his action in that regard unless there has been a palpable abuse of that discretion. *Blakey v. Johnson*, 13 Bush 197; *Kennedy v. Ten Broeck*, 11 Bush 241.

(2) **Jury trial—effect of verdict.** When a distinct legal issue is submitted to a

jury in an action begun in equity and transferred for the settlement of the legal issue, the verdict of the jury is to be treated as in ordinary jury trials, and will not be disturbed unless palpably against the evidence. *Hill v. Phillips*, 87 Ky. 169; but when an issue of fact in a purely equitable action is submitted to a jury, their verdict is not necessarily conclusive, and the chancellor may disregard it. *Hill v. Phillips*, 87 Ky. 169; *McElwain v. Russell*, 11 R. 649.

(3) **Motion to transfer** comes too late after the court has rendered a judgment determining all the issues involved. *Hartford Ins. Co. v. Haas*, 87 Ky. 531, and see further notes to sec. 10.

(4) **See further** secs. 312 and 313, and notes thereto.

§ 13. Transfer from one court to another. An answer and cross-petition may be transferred under this section from one court to another, although the petition is not removed, and the court to which it is transferred may try the issue presented by the cross-petition in the absence of the petition. *Harreld v. Howard*, 80 Ky. 51.

§ 14. Failure to give bond—trial of equitable issue. To a suit on a note, defendant

ordinary action, properly commenced as such, if the defendant be entitled to the transfer of one or more issues to the equity docket, and move for such transfer, the plaintiff may file his affidavit that he verily believes he will succeed in the action, and that the collection of his claim, after judgment, will be endangered by delay arising from such transfer; and if such affidavit be filed, the court shall not grant the motion of the defendant to transfer, except upon condition that the defendant execute a bond, with good surety, approved by the court, that he will pay any judgment rendered in favor of the plaintiff: *Provided*, That no such bond shall be required if the trial of the case or issue transferred take place during the term at which the transfer is made, nor until all issues not transferred are tried or disposed of in favor of the plaintiff. (*Form of affidavit, page 627. Form of bond, page 625.*)

§ 15 (12) **Waiver of error as to form of action**—"exception." An error as to the kind of proceedings adopted in the action is waived by failure to move for its correction at the time and in the manner prescribed in this chapter; and errors in the decisions of the court, on any of the motions named in this chapter, are waived, unless excepted to at the time—which may be done by the clerk noting, at the end of such decision, words of the following import: "To which decision the plaintiff (or defendant) excepts." (*See further as to exceptions, sec. 333.*)

§ 16 (13) **Provisions of Code apply to all civil actions.** The provisions of this Code apply to all civil actions, unless the contrary appears.

pleaded an exclusively equitable defense and moved to transfer to equity. The plaintiff filed the affidavit provided for in this section, and, failing to execute bond, his motion was overruled. Defendant then transferred his answer and cross-petition to another court. The court say: "Had he let his answer remain where it was when his motion to transfer was overruled, no judgment could have been rendered against him until the issue presented by it was disposed of, because he had a right to rely upon an equitable defense, and, having made the motion to transfer the case to equity, no trial of the action or judgment by default could have been had, as is contemplated by sec. 10, subsec. 3 of Code." *Harreld v. Howard*, 80 Ky. 51.

Watts, 84 Ky. 537, the court say "It was therefore not intended that either the act adopting the civil or the one adopting the criminal Code should repeal the General Statutes as a whole or any part thereof, except such as in the repealing sections of both comes within the purview of the acts respectively." The provision repealing all acts coming within its purview should be understood as repealing all acts in relation to cases which are provided for by the repealing act, and that the provisions of no act are thereby repealed in relation to cases not provided for by it; and see sec. 838.

(2) "Finding such an intermingling of rights and remedies in the Code and Statutes, this court holds that a remedial act found in the General Statutes is not repealed unless a remedy for the enforce-

§16. (1) **Conflict of laws.** In *Com. v.*

§ 17 (a) **Ordinary judgment—when corrected in equity.** A judgment obtained in an ordinary action shall not be annulled or modified by any order in an equitable action, except for a defense which arises or is discovered after rendition of the judgment. But such judgment does not prevent the recovery of any claim which was not, though it might have been, used as a defense by way of set-off or counterclaim in the action. (*As to how judgments vacated and modified, secs. 513 to 524.*)

ment of the same right is found in the Code." *Newman v. Ecton*, 14 R. 793.

(3) **Special practice acts** passed prior to adoption of present constitution and which are not in conflict with its provisions, or laws made in pursuance thereof, are yet in force. *Piper v. Gunther*, 95 Ky. 115.

§ 17. (1) **Common law judgment.** The chancellor has no jurisdiction to cancel, set aside or correct common law judgment, except for some cause of new trial under other provisions of the Code, or for defense arising or discovered after judgment. *Emmerson v. Herriford*, 8 Bush 229; *Farmers Bank v. Collins*, 13 Bush 138; *Com. v. Cain*, 80 Ky. 318.

(2) Common law judgment against a *cestui que trust* in an action to which trustee was not a party, does not bind the trustee, and he may resist its enforcement against the trust estate. *Roberts v. Yancey*, 94 Ky. 243; nor is judgment against personal representative conclusive against the heirs in an action to subject estate received by them. *Jones v. Com. Bank*, 78 Ky. 413; *Stevenson v. Flournoy*, 89 Ky. 561; *Willis v. Roberts*, 90 Ky. 122.

(3) **Defense known must be pleaded.** If the matter of defense is substantially within the knowledge of defendant at the time judgment is rendered against

him, he will not be permitted to annul or modify the judgment. *McCown v. Macklin*, 7 Bush 308.

(4) Where a defendant fails to plead a payment he has made on claim sued on he can not thereafter, in the absence of fraud or mistake, have judgment modified by chancellor or enjoin its collection in order that he may use as a set-off the payment. *Walker v. Thomas*, 88 Ky. 486.

(5) **Usury—attorney fee.** If defendant permits judgment for usury to go against him without interposing a defense known to him at the time, he can not afterward have the judgment modified. *Chinn v. Mitchell*, 2 Met. 92; *Thomasson v. Townsend*, 10 Bush 114; but he may in an action at law recover usury paid by him either upon a judgment at law or in equity. *Sherley v. Trabue*, 85 Ky. 71; or he may recover it by an action in equity. *Ross v. Ross*, 3 Met. 274.

(6) When a judgment is rendered by default for an attorney fee stipulated in the writing sued on, and properly set up, the defendant will be without remedy. *Thomasson v. Townsend*, 10 Bush 114.

(7) **Void judgment** may be resisted in any court in which it is attempted to be enforced. *Spencer v. Parsons*, 89 Ky. 577; *Stevens v. Deering*, 10 R. 393.

Commw. v. L. R. R. Co. 20 K. L. R. 373

TITLE III.

PARTIES TO CIVIL ACTIONS.

- CHAPTER I. PARTIES TO ACTIONS GENERALLY, 18.
 II. PARTIES TO CERTAIN ACTIONS, 30.
 III. ACTIONS CONCERNING MARRIED WOMEN, 34.
 IV. PERSONS UNDER DISABILITY—PROVISIONS CONCERNING, 35.

CHAPTER I.

PARTIES TO ACTIONS GENERALLY.

- § 18. Action to be in name of party in interest—exception.
 § 19. Assignee of chose in action—check or bill.
 § 20. Assignment pending action—practice.
 § 21. Fiduciary or person authorized by Statute.
 § 22. Interested persons may be joined as plaintiffs.
 § 23. Interested person may be made defendant.
 § 24. Persons united in interest must be made parties.
 § 25. Numerous parties—one or more may sue or defend for all.
 § 26. Contracts—bills—checks—action on.
 § 27. Action against persons jointly bound on contract.
 § 28. New parties—court may require—practice.
 § 29. Claimant of property may be made party—practice.

§ 18 (30) Action to be in name of party in interest—exception. Every action

2nd 9th 109.

§ 18. (1) **Action for one's benefit makes him party.** One for whose use and benefit it is stated in the petition an action is brought is thereby virtually made a party, and may by amended petition assume the attitude of plaintiff. *Fenwick v. Phillips*, 3 Met. 88; *Neely v. Merritt*, 9 Bush 346; see also *Revill v. Claxon*, 12 Bush 558.

(2) **Administrator de bonis non** may maintain an action on a note taken by former administrator in his own name for a debt due the intestate, he not being charged with it in the settlement of his accounts. *Burrus v. Roulhac*, 2 Bush 39; *Maraman v. Trunnell*, 3 Met. 146.

(3) **Assignor of note.** Payee of note who has transferred it by parol is necessary party to an action in name of assignee. *Gill v. Johnson*, 1 Met. 649; *Perry v. Seitz*, 2 Duv. 122; but if assignment is in writing assignor is not necessary party. *True v. Triplett*, 4 Met. 57.

(4) **Bank check.** Holder of a check

who can trace legal title to it may maintain action on it, whether he possesses beneficial interests in it or not. *Harpenden v. Daniel*, 80 Ky. 449.

(5) The holder of an unaccepted check on bankers may maintain action on it against them, if drawer had sufficient deposit to pay it at the time it was drawn, and they were notified it was drawn on them. *Lester v. Given*, 8 Bush 357.

(6) **Beneficiary of contract.** Party for whose benefit a contract is made may sue thereon in his own name, although the undertaking is not directly to or with him. *Allen v. Thomas*, 3 Met. 198; *Smith v. Smith*, 5 Bush 625. And see *Rogge v. Cassidy*, 12 R. 54; *Paducah Lumber Co. v. Paducah Water Co.*, 89 Ky. 340; *Davis v. Wiley*, 3 R. 315.

(7) The beneficial owner of notes sued on is necessary party. *Humphreys v. Pearce*, 1 Duv. 237; *Carpenter v. Miles*, 17 B. M. 598.

must be prosecuted in the name of the real party in interest, except as is provided in section twenty-one.

(8) **Consignee of goods** or property is the proper person to maintain action against the carrier. *Smith v. Lewis*, 3 B. M. 229; *Allen v. Thomas*, 3 Met. 198.

(9) **Co-obligor paying debts** may sue other obligors in name of payee, if at time he pays debt it is agreed that suit shall be so brought. *Smith v. Lattimer*, 15 B. M. 75.

(10) **Corporation** may maintain suit in its own name on the bond of one of its officers, though executed to the president and directors. *Graves v. Leb. Nat. Bank*, 10 Bush 23; and may sue to recover stock subscribed before company was organized. *Lackey v. R. & L. T. P. Co.*, 17 B. M. 48.

(11) Action against officers of a corporation for misconduct should be brought by the corporation; but if its officers decline to sue, the stockholders may sue in equity. *Jones v. Johnson*, 10 Bush 649; 79 Ky. 300.

(12) Action lies in corporate name to recover stock subscribed to the corporation before its organization, and made payable to the president and directors. *Lackey v. R. & L. T. P. Co.*, 17 B. M. 43.

(13) **County.** Action for unlawfully burning courthouse may be brought by county. *Christian County v. Rankin*, 2 Duv. 502. And for injury to county roads county may maintain action. *Lawrence County v. Chattaroi R. R. Co.*, 81 Ky. 225; *L. & N. R. R. Co. v. Whitley Co.*, 95 Ky. 215. See further, *Montgomery Co. v. Menifee Co.*, 93 Ky. 33.

(14) **Covenants real** run with the land, and if broken the right of action is in the transferee of the covenantee. *Nunnally v. White*, 3 Met. 584.

(15) **Creditor** may maintain action on an obligation executed to his debtor by a person who agreed therein to pay his debts. *Garvin v. Mobley*, 1 Bush 48.

(16) **Equitable owner.** Action for debt not assignable by statute must be brought in name of equitable owner, and

the assignor is a necessary party, either plaintiff or defendant. *Lytle v. Lytle*, 2 Met. 127, and see sec. 19.

(17) **Executor authorized to sell land** devised to him for that purpose may maintain an action to recover it. *Jenning v. Monk*, 4 Met. 103; but where the executor is only vested with the naked right to sell and distribute the proceeds, action must be brought by heirs. *Reynolds v. Boyd*, 92 Ky. 249; *Warfield v. English*, 11 R. 263.

(18) **Fraudulent conveyance.** Action to set aside fraudulent conveyance made by a bankrupt should be in name of assignee. *Anderson v. Anderson*, 80 Ky. 638; and see Ky. Stat. sec. 84.

(19) **Guaranty, action on.** In an action by a depositor of a bank on a guaranty to pay the depositors the amount of their deposits, the other depositors are not necessary parties. *Stedman v. Guthrie*, 4 Met. 147.

(20) **Members of church** who have been excommunicated can not maintain an action concerning the church property. *Shannon v. Frost*, 3 B. M. 253.

(21) **Mistake by bank** in paying out too much money on check of general depositor, action to recover money should be in name of bank. *Keene v. Collier*, 1 Met. 415.

(22) **Obligation to two persons.** Neither has a separate right of action unless other has assigned to him. *Quisenberry v. Artis*, 1 Duv. 30.

(23) **Obligor and payee same person.** When a note is made payable to one of the obligors and a third person, the third person can sue in his own name. *Quisenberry v. Artis*, 1 Duv. 30.

(24) **Officer's bond.** Action on may be brought by a party in interest in his own name, if there is any covenant in the bond to the benefit of which he is entitled. *Hughes v. Cotton*, 13 Bush 596; *Lane v. Kasey*, 1 Met. 410; or action may be brought in name of Commonwealth for benefit of party injured. *Com. v. Teal*, 14 B. M. 29.

§ 19 [31] **Assignee of chose in action—check or bill.** In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set-off or defense now allowed; and if the assignment be not authorized by statute the assignor must be a party, as plaintiff or defendant. This section does not apply to bills of exchange, nor to promissory notes placed upon the footing of bills of exchange, nor to common orders or checks. (When assignee required to secure costs, sec. 619; see further as to assignable instruments and bills of exchange, secs. 474, 483, Ky. Stat.)

(25) **Order unaccepted.** The holder of an unaccepted order drawn by the holder of a note upon the payor for part of the note can not maintain an action on the order against the payor. Weinstock v. Bellewood, 12 Bush 139.

(26) **Payor and creditor may unite.** One who is bound for a debt by parol undertaking may unite with his creditor to whom he has paid it in an action against person who received benefit of debt. Dean v. English, 18 B. M. 132.

(27) **Stakeholder.** Action under statute to recover money from a stakeholder must be brought in name of principal. Donahoe v. McDonald, 92 Ky. 123; Ky. Stat., sec. 1959.

(28) **Telegraph message.** Party to whom a telegraphic message is addressed as well as the sender may maintain action against company for damages for failing to deliver it. Chapman v. W. U. T. Co., 90 Ky. 265.

(29) **Trust property.** Where a deed of trust vests property in the *cestui que trust* subject to his debts, any creditor may sue for his debt without making other creditors parties, or alleging that he is only creditor. Goldburg v. Drabelle, 4 Bush 426.

§ 19. (1) **Assignments authorized by statute,** see Kentucky Statutes, sec. 474; as to what promissory notes are placed on footing of bills of exchange, see Kentucky Statutes, sec. 483.

(2) **Assignment—how made.** Any order, writing or act which makes an appropriation of the fund amounts to an equitable assignment. No set form of words is necessary. Frankfort Bank v. Hunter, 3 Mar. 292; Newby v. Hill, 2 Met. 530;

and a chose in action may be assigned by parol. Gray v. Briscoe, 6 Bush 687; 2 Met. 530.

(3) **Bills and notes—defenses against.** When a note payable and negotiable at an incorporated bank is discounted before maturity by such a bank, partial or total failure of consideration or fraud will not be available as a defense to it, nor will any discount or set-off be allowed against it. Kelly v. Smith, 1 Met. 313; Spencer v. Biggs, 2 Met. 123; but if discounted after maturity it is subject to such defenses as might have been made against original owner. Greenwell v. Haydon, 78 Ky. 332; Lester v. Givens, 8 Bush 357.

(4) A note in the hands of one who has procured it to be discounted in a bank and has afterward taken it up is subject to any defense that could have been made against it before discount. Cline v. Templeton, 78 Ky. 550; and the holder of commercial paper who has received it as collateral security for an antecedent debt is not a *bona fide* holder. 78 Ky. 332; 1 Met. 628.

(5) A promissory note payable in another State, and placed by the laws of that State on the footing of a bill of exchange, is to be treated here as a bill of exchange. Stevens v. Gregg, 80 Ky. 461; overruling Davis v. Morton, 5 Bush 160.

(6) Note payable at a private bank can not be put on footing of a bill of exchange. Campbell v. Farmers Bank, 10 Bush 152; and see further Payne v. Bank, 10 Bush 176; 4 Bush 268.

(7) **Defense against assignee.** The debtor may, as against assignee, avail himself of any defense arising before he had notice

§ 20 ⁽²²⁾ **Assignment pending action—practice.** If the right of the plaintiff be transferred or assigned during the pendency of the action, it may be continued in his name; or the court may allow the person to whom the transfer or assignment is made be substituted in the action, proper orders being made as to security for the costs.

§ 21 ⁽²³⁾ **Fiduciary or person authorized by statute.** A personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a receiver appointed by a court, the assignee of a bankrupt, or a person expressly authorized by statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted. (*Who is "Personal representative,"* sec. 732-17.)

of assignment and which he could have relied on in an action by person to whom he executed note. *Chiles v. Com.*, 3 Mar. 231; *Day v. Billingsly*, 3 Bush 157; 4 Mon. 79.

§ 20. (1) **Assignment pending suit—costs.** Where a right of action is assigned pending the suit, and the assignee substituted on the record without objection from the adverse party, the original party is released from liability for costs. *Warner v. Turner*, 18 B. M. 758.

(2) This section vests a discretion in the court to be exercised in the furtherance of justice; and when the party to whom assignment is made is substituted, security should be required for past and future costs. *Dougherty v. Smith*, 4 Met. 279.

(3) **Compromise after notice of transfer.** After a claim in suit has been transferred to a third person not a party to the action, and the defendant notified of the transfer, he can not compromise with the plaintiff to the prejudice of the assignee. *Cantrell v. Hewlett*, 2 Bush 311.

(4) **Notice of substitution.** Where the plaintiff in an action makes an assignment for the benefit of his creditors, it is not necessary to give defendant notice of the substitution of the assignee as plaintiff. *Jewell v. Porter*, 11 R. 162.

(5) **Rights of assignee.** This section confers on assignee the right to be substituted as plaintiff or to prosecute action in name of plaintiff without such

substitution. *Cantrell v. Hewlett*, 2 Bush 311.

§ 21. (1) **Administrator refusing to sue** heir or distributee may sue to recover property due the intestate, but the personal representative is a necessary party. *McChord v. Fisher*, 13 B. M. 194.

(2) **Assignee.** Assignee should bring suit to set aside fraudulent conveyance made by a bankrupt. *Anderson v. Anderson*, 80 Ky. 638; see further, *Ky. Stat.*, sec. 84.

(3) **County court may sue on bond** executed to county court by tax collector without joining county as a party. *Hardy v. Logan Co.*, 15 R. 405.

(4) **Executor who by will is directed** to lease a ferry can maintain in his own name an action in equity to be quieted in the enjoyment of the franchise. *City of Newport v. Taylor*, 16 B. M. 700.

(5) **Guardian to sue in name of ward.** Guardian can not sue in his own name for personal property of his ward unlawfully detained. The suit must be in name of infant by the guardian. *Anderson v. Watson*, 3 Met. 510; nor can he maintain in his own name action to eject tenant of his ward after expiration of lease; suit must be in name of ward. *Powell v. Gossom*, 18 B. M. 179, 13 B. M. 194, and see *Wilson v. Unselt*, 12 Bush 215; but he may sue in his own name upon a note taken by him for money of his ward. *McChord v. Fisher*, 13 B. M. 194; and in other cases in which he might have

§ 22 ⁽²⁴⁾ **Interested persons may be joined as plaintiffs.** All persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs, unless it is otherwise provided in this Code.

§ 23 ⁽²⁵⁾ **Interested person may be made defendant.** Any person may be made a defendant who claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved in the action.

§ 24 ⁽²⁶⁾ **Persons united in interest must be made parties.** Parties who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should be joined as plaintiff can not be

maintained action before adoption of Code. 3 Met. 510.

(6) **Receiver** can not bring an action involving title to realty without joining with him the parties in interest. *Caldwell v. McWhorter*, 84 Ky. 130.

(7) **Sheriff to whom estate is committed as administrator *de bonis non*** may sue upon notes executed to the former representative, and which came into his hands as assets. *Maraman v. Trunnel*, 3 Met. 146.

(8) **Trustee can sue at law for property to which he holds the legal title, and in equity where he is entitled to receive and hold the property for the benefit of the *cestus que trust* without making latter party, but trustee under a mortgage made to secure the payment of money to others can not sue for a foreclosure without making them parties.** *B. & L. R. R. Co. v. Metcalfe*, 4 Met. 199, and see further *Krieger v. Bissell*, 80 Ky. 330, where it is held that trustee for bondholders can maintain suit for sale of land for their benefit without joining the beneficiaries, the court making a distinction between this case and the *Metcalfe* case.

(9) Where a will conferred upon a trustee power to name his successor, the *cestus. qui trust* was not a necessary party to an action by the trustee to have a successor appointed. *Barclay v. Goodloe*, 83 Ky. 493; but where a trustee desires to be released and have a new trustee appointed, he must bring all the beneficiaries before the court. *Clay v. Edwards*, 84 Ky. 548.

(10) **Trustee to whom property is con-**

veyed for the separate use of a married woman may sue for it in his own name. *McClanahan v. Reasley*, 17 B. M. 111.

§ 23. (1) **Defect of parties—misjoinder.** Objection because of defect of parties must be made by demurrer, sec. 92, or by pleading, sec. 118, and if not so made is waived, secs. 92, 118, 10 Bush 763; and can not be made for first time in Court of Appeals, 12 Bush 327, 80 Ky. 684. Misjoinder must be taken advantage of by motion to strike out, sec. 134, 1 Duv. 84; 18 B. M. 132; 1 Met. 133.

(2) **Interested parties to be made defendants.** Action to enjoin collection of a replevin bond executed in satisfaction of a judgment in favor of Commonwealth was properly brought against county attorney, Commonwealth attorney, clerk and sheriff. *Bramlett v. McVey*, 91 Ky. 151.

(3) Action to compel a county court by mandamus to levy a tax must be against the persons composing the court. *Montgomery Co. v. Menifee Co.*, 93 Ky. 33.

(4) **Sureties on bond of guardian** given in county court are not necessary parties to an action on the bond of same guardian given in circuit court in an action to sell land of ward. *Johnson v. Chandler*, 15 B. M. 584.

§ 24. (1) **Administrator of debtor.** In an action to set aside a voluntary conveyance the administrator of the debtor is a necessary party. *Alexander v. Quigley*, 2 Duv. 399.

(2) **Assignee.** In an action by the stockholders of a corporation that has as-

obtained, he may be made a defendant; the reason being stated in the petition.

signed, against the officers, the assignee is a necessary party. *Jones v. Johnson*, 10 Bush 649.

(3) **Auditor of State—city council.** Suit may proceed against the successor in office of the auditor by suggesting the fact on the record. *Lindsey v. Auditor*, 3 Bush 231. As to actions against city council, see *Maddox v. Graham*, 2 Met. 56; 18 B. M. 9.

(4) **Beneficiaries in trust deed.** In an action to recover the trust estate, where the title is held as a naked trust with only limited power to convey, the beneficiaries are necessary parties. *C. & L. R. R. Co. v. Bowler*, 9 Bush 468; see further, *Krieger v. Bissell*, 80 Ky. 330.

(5) **County.** In action by taxpayers to prevent money raised by taxation from being illegally paid out, county is proper party. *Howard v. Dep. Bank*, 80 Ky. 496.

(6) **Court may make parties.** Any person having adverse interest may be made party by the court. 15 B. M. 205; and see sec. 28 and notes thereto.

(7) **Distributees and heirs.** Distributees can not join in a suit against an administrator to recover balance due them on settlement. *Pelly v. Bowyer*, 7 Bush 513; nor can one action be maintained against guardian of four wards to recover specific amounts due by each of them. *St. Joseph Society v. Wolpert*, 80 Ky. 86.

(8) **Heirs and distributees** may be permitted to be made parties, and to prosecute or defend suit by or against the administrator of their intestate if it appears from affidavit that the administrator is not acting in good faith, or that it will be advantageous to their interest. *Gibson v. Higdon*, 15 B. M. 205; *Lusk v. Anderson*, 1 Met. 426; 8 Bush 564.

(9) **Heirs of vendor** who has not conveyed land sold are necessary parties to an action by his administrator to enforce the vendor's lien; or to an action to subject land by attachment to purchase-money. *Anderson v. Sutton*, 2 Duv. 480; 79 Ky. 465.

(10) In action to subject land, holder of legal title is necessary party. *Ogle v. Clough*, 2 Duv. 145.

(11) In an action against an executor for specific performance of a contract to convey land, heirs of vendor are necessary parties. *Craig v. Johnson*, 3 J. J. M. 572.

(12) **Holders of different land notes.** The holders of the other land notes are necessary parties to an action by the holder of one of them to enforce his lien. *Graham v. Chatoque Bank*, 5 B. M. 45; 2 B. M. 29; and see secs. 692-694, and notes thereto.

(13) **Infants named in petition parties.** Infants whose names are in petition, but not in caption, are made parties in an action filed by their guardian to sell their realty. *Revill v. Claxon*, 12 Bush 558.

(14) **Joint owners of land.** Joint owners of land may join in one action against several persons who are in possession of the land holding different parcels. *Woolfolk v. Ashley*, 2 Met. 288. In *Sale v. Crutchfield*, 8 Bush 636, a similar case, it is said plaintiffs could have been required to elect which defendant they would prosecute.

(15) In a suit by one joint owner against the other to have the land owned by them divided, an adverse claimant of the land can not be made a party on his petition. *McIntire v. McIntire*, 82 Ky. 502.

(16) **Married woman.** In action by married woman on an indemnifying bond to recover damages for selling her separate estate, her husband is not a necessary or proper party. *Bayse v. Brown*, 78 Ky. 553. Married woman can now sue in her own name, Ky. Stat., sec. 2128.

(17) **Mortgagee—duty of.** It is the duty of a mortgagee in an action to enforce his lien to bring subsequent known mortgagees before the court. *Macey v. Fenwick*, 4 B. M. 306. See further, secs. 692-694 and notes thereto.

(18) **School trustees.** Trustees of each school district in the county have a sep-

§ 25 [27] **Numerous parties—one or more may sue or defend for all.** If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all.

§ 26 [28] **Contracts, bills, checks—action on.** Persons severally liable upon the same contract, and parties to bills of exchange, to promissory notes placed upon the footing of bills of exchange, or to common orders and checks, and sureties on the same or separate instruments, may all or any of them, or the representatives of such as may have died, be included in the same action at the plaintiff's option. (*Judgment against secs. 370, 373; when can not be rendered, sec. 80.*)

arate cause of action against a defaulting school commissioner and his sureties. The trustees of all the districts can not unite in one action, nor can the subsequently appointed commissioner sue. *Hammond v. Crawford*, 9 Bush 75; and see further as to action by trustees, *Wright v. Baker*, 94 Ky. 343; *Lewis v. Trustees*, 5 R. 767.

(19) **Surety.** In proceeding by surety to have judgment he has paid assigned to him, the principal should have notice of the application. *Veach v. Wickersham*, 11 Bush 261.

§ 25. (1) **Construction of section.** It is only where a suit involves a common or general interest of many persons that one or more may sue for all. It is not sufficient that the matters presented by the pleadings raise a question of law of common or general interest, nor is the action of the lower court in permitting one or more to sue for all conclusive. *Oswald v. Morris*, 92 Ky. 48; and see *Alexander v. Gish*, 10 R. 989; *B. & L. R. R. v. Metcalfe*, 4 Met. 199.

(2) Where the parties interested are so numerous as to vexatiously prolong the suit and probably prevent a full hearing, or it is impracticable to bring all of them before the court in a reasonable time, court may permit portion to sue for all. *Hendrick v. Money*, 1 Bush 306; *L. & O. T. P. Co. v. Ballard*, 2 Met. 165; *Robinson v. Robinson*, 11 Bush 174; 4 Met. 199; and where parties are numerous and an action is brought by some for benefit

of all, unless others object it will be presumed they assent to its prosecution. *Flint v. Spurr*, 17 B. M. 500.

(3) **Church committee** appointed for that purpose may maintain an action for and concerning church property. *Shannon v. Frost*, 3 B. M. 253; *Humphrey v. Burnside*, 4 Bush 215; 8 B. M. 70; 7 B. M. 481; or action may be prosecuted or defended by trustees. Ky. Stat., sec 321.

(4) **Part of heirs may contest will** for benefit of all concerned when it is impracticable to bring all of them before court. *Randolph v. Lampkin*, 90 Ky. 551.

(5) **Practice.** Trustee for bondholders may maintain action in his own name for their benefit, but in such case where the beneficiaries are not parties the court should retain control over the money collected for the benefit of those entitled thereto. *B. & L. R. R. v. Metcalfe*, 4 Met. 199.

§ 26. (1) **Construction of section.** Plaintiff holding two or more separate obligations against same parties may sue upon all of them in one action, or if the principal in two or more obligations is same person and the sureties in part the same, he may in one action sue on both obligations, omitting as defendants those sureties not on each paper. *Com. v. Tate*, 89 Ky. 608.

(2) **Guarantors.** Several signers of contract of guaranty for the payment each of \$100 may be sued jointly. *Wilde v. Haycraft*, 2 Duv. 309.

§ 27 ⁽²⁹⁾ **Actions against persons jointly bound on contract.** If two or more persons be jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option. If any of the persons so bound be dead, the action may be brought against any or all of the survivors with the representatives of all or any of the decedents, or against the latter or any of them. If all the persons so bound be dead, the action may be brought against the representatives of all or of any of them. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others. (*Judgment against, secs. 370, 373; when can not be rendered, sec. 80; variance between pleading and proof, sec. 131; see further, Ky. Stat. sec. 476.*)

§ 28 ^(40, 400) **New parties—court may require—practice.** The court may determine any controversy between parties before it, if it can do so

(3) **Owners of property and city.** The city and owners of property fronting streets improved may be sued in the same action by the contractor. *City of Lou. v. Henderson*, 5 Bush 515.

(4) **Sub-lessee and Assignee.** A lessee may sue jointly a sub-lessee and his assignee upon a contract of the sub-lessee to pay him rent. *Trabue v. McAdams*, 8 Bush 74.

(5) **Warranty.** Where several join in same deed, each warranting his undivided interest, a suit against each for his proportion of the amount due for breach of warranty is proper. *Evans v. Sanders*, 10 B. M. 291.

§ 27. (1) **Joint obligors—separate action against.** The common law rule has been changed by the Code, and persons jointly liable may be sued separately. *Waits v. McClure*, 10 Bush 763; *Gossom v. Badgett*, 6 Bush 97; 1 Duv. 30.

(2) **Partners may be sued severally.** One or all of the partners may be sued by a creditor of the firm, and judgment against one or more will not be a bar to proceeding against the others. *Williams v. Rogers*, 14 Bush 776; *Moore v. Estes* 79 Ky. 282; overruling *Nichols v. Burton*, 5 Bush 320, in so far as it holds that judgment against one partner amounts to a satisfaction of the claim against other partners. See further, notes to secs. 370, 373.

§ 28. (1) **Appearance.** Persons required by the court to appear and assert their claims if any to a fund in controversy entered their appearance by filing special and general demurrers. *Underwood v. Wood*, 93 Ky. 177.

(2) **Bondholder—mandamus—parties.** In proceeding by bondholder for mandamus to compel city council to levy tax to pay interest on bonds, neither the taxpayers, railroad company that assigned bonds, nor other bondholders are necessary parties. *Maddox v. Graham*, 2 Met. 56.

(3) **Court may require new parties made.** When record shows that money sought to be recovered from a garnishee belongs to one not a party, court should require owner brought before it. *Forepaugh v. Appold*, 17 B. M. 626.

(4) In an action by a stockholder, where the corporation was an indispensable party, the court say: "It was not proper for the court to require the plaintiff to bring the corporation before it. This was plaintiff's duty, as in the absence of the corporation no relief could be granted." *Shawhan v. Zinn*, 79 Ky. 300.

(5) The court should order all persons interested in the controversy to be brought before it, although they have agreed not to sue until the happening of a certain event. *Lou. v. Henderson*, 5 Bush 515. See *Com. v. Frankfort*, 13 Bush 185. And if, upon hearing the evi-

without prejudice to others; if it can not do so, it must require such other persons to be made parties, or must dismiss the action without prejudice. (*When court may dismiss action, sec. 371-2.*)

§ 29 (41, 357) **Claimant of property may be made party—practice.** In an action or proceeding for the recovery of real or personal property, or for the subjection thereof to a demand of the plaintiff under an attachment or other lien, any person claiming a right to, or interest in, the property or its proceeds, may, before payment of the proceeds to

dence, the court should believe that a party mentioned in the pleadings has such an interest as to render him a necessary party, he should be brought in. *Vanbuskirk v. Levy*, 3 Met. 134.

(6) Court may determine controversy without having all persons interested before it when it can be done without prejudice to their rights, or when their rights can be saved. If this can not be done, such other persons must be brought in. *Johnson v. Chandler*, 15 B. M. 584.

(7) When petition omits necessary parties, the chancellor ought, before final hearing, notify the plaintiff and give him reasonable time to supply defect. *Ogle v. Clough*, 2 Duv. 145.

(8) **Defect of parties—how objected to.** An objection to a pleading because of defect of parties can be made by demurrer, sec. 92-4, or by pleading, sec. 118; and, if not made in one of these ways, is waived, secs. 92, 118; *Waits v. McClure*, 10 Bush 763, and can not be made for first time in Court of Appeals. *Hardee v. Hall*, 12 Bush 327; *McAlister v. Savings Bank*, 80 Ky. 684; 10 Bush 23; 3 Bush 200.

(9) **Misjoinder of parties—how objected to.** Misjoinder of parties can only be taken advantage of by motion to strike out. *Yeates v. Walker*, 1 Duv. 84; *Dean v. English*, 18 B. M. 132; 1 Met. 123.

(10) **Lienholders to be made parties.** Vendor of land who has a lien on it should be brought before the court in a suit in which the land is attached by creditor of the vendee. *Mills v. Brown*, 2 Met. 404. And where mortgaged property is attached, the mortgagee should be made a party. *Martin v. M. & O. R. R. Co.*, 7 Bush 116. See further, sec. 694 and notes thereto.

(3)

(11) **Payee not necessary party.** Payee of land note not necessary party to an action by his assignee to enforce lien. *Leacock v. Hall*, 13 B. M. 211.

§ 29. (1) **Claimant—petition of.** When a claimant presents his petition to be made a party, and is considered by the court and parties as a party, and the action proceeds as if he was, he will be so considered, although actually never made a party. *Schwein v. Sims*, 2 Met. 209. In *Taylor v. Taylor*, 3 Bush 118, it is held that a claimant need not be made a party to the original suit; with its litigation he has nothing to do. The issue to be tried as to him is the validity of the claim he prefers. See also *Miller v. Desha*, 3 Bush 212; *Bank of Col. v. Overstreet*, 10 Bush 148.

(2) Claimant should be permitted to file petition and assert claim at any time before the disposition of the property against which claim is asserted. *Murphy v. Cochran*, 80 Ky. 239; *Heaverin v. Robinson*, 15 R. 15; but the petition must be verified and set forth the claimant's cause of action. *Lampton v. Lewis*, 1 R. 66; and see *Ritchie v. C. N., O. & T. R. R.*, 14 R. 831, where the court holds that unreasonable delay in asking to be made party is a waiver of right.

(3) Creditors of a person who has assigned for benefit of creditors can controvert attachments levied on his property shortly before assignment. *Bamberger v. Halberg*, 78 Ky. 376.

(4) A party whose claim is hostile to that of both litigants can not come in as plaintiff with a new and independent cause of action with reference to property in controversy and require both of original parties to answer, although upon a

the plaintiff, file, in the action, his verified petition, stating his claim and controverting that of the plaintiff; whereupon the court may order him to be made a defendant; and upon that being done, his petition shall be treated as his answer. But if he be a non-resident he must give security for costs. (*Claimant of attached property to give information, sec. 220; see also, sec. 30.*)

CHAPTER II.

PARTIES TO CERTAIN ACTIONS.

§ 30. Claimant of property may be made party—practice.

§ 31. Preceding section applicable to officer sued.

§ 32. Substitution of plaintiff in writ for officer sued.

§ 33. Property distrained—action to recover.

§ 30 ^[42] **Claimant of property may be made party—practice.** Upon affidavit of a defendant before answer, in an action upon contract, or for the recovery of personal property, that a person who is not a party to the action, without collusion with him, makes a claim to the subject of the action, and that the affiant is ready to pay or dispose thereof as the court may direct, the court may make an order for the safe-keeping of the subject of the action, or for its payment or deposit in court, or for its delivery to such person as the court may direct, and an order requiring such alleged claimant to appear in a reasonable time and maintain or relinquish his claim against the defendant, and, in the meantime, stay the proceeding. If such alleged claimant, being served with a copy of the order, fail to appear, the court may declare him barred of all claim in respect to the subject of the action against

proper state of case the court might make him a defendant. *Scott v. Willson*, 6 R. 308.

(5) After final judgment it is too late for a stranger to the action to file a petition to be made a party. *Meadows v. Goff*, 90 Ky. 540.

(6) **Claimant of attached property** being made a party may, upon evidence that he is the owner, recover the property by showing that the attachment is invalid or that after levy it was dissolved by operation of law. *Bank v. Overstreet*, 10 Bush 148; and see *Peters v. Conway*, 4 Bush 565.

§ 30. (1) **Affidavit required—object of.** The affidavit required by this section is designed to take the place of the more formal pleading required before the Code, and it must appear that there is no collusion between the parties. *Starling v. Brown*, 7 Bush 164.

(2) **Money wrongfully obtained—disposition of.** Money, although wrongfully obtained, being produced to the court, is a fund in court, and when claimed by more than one party the court should, where the pleadings justify it, submit the question of ownership to a jury, and order the money paid over according to the

the defendant therein. If he appear he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action upon his compliance with the order of the court for the payment, deposit, or delivery thereof. (*Provisions concerning deposit in court, secs. 303, 304.*)

§ 31 ⁽⁴³⁾ **Preceding section applicable to officer sued.** The provisions of section thirty shall be applicable to an action against a sheriff or other officer for the recovery of personal property taken by him under execution or distress warrant, or for the proceeds of such property so taken and sold by him. And the defendant in such action shall be entitled to the benefit of those provisions against the party in whose favor the execution or distress warrant issued, upon exhibiting to the court the process under which he acted, with his affidavit that the property, for the recovery of which, or its proceeds, the action is brought, was taken under such process.

§ 32 ⁽⁴⁴⁾ **Substitution of plaintiff in writ for officer sued.** In an action against a sheriff or other officer for the recovery of property taken under an execution or distress warrant the court may, upon the application of the defendant and of the party in whose favor the execution or distress warrant is issued, permit the latter to be substituted as the defendant, security for the costs being given.

§ 33 ⁽⁴⁵⁾ **Property distrained—action to recover.** An action to recover the possession of specific personal property taken under a distress warrant, if it be brought by the tenant, or his assignee or under-tenant, may be against the party who sued out the warrant; and the property claimed in such action may, under the order for its delivery, be taken from the officer who seized it if he have no other claim to hold it than that derived from the warrant. The indorsement of a levy on the property, made upon the warrant by the officer holding it, shall be a sufficient taking of the property to sustain the action against the party who sued out the warrant. (*How order of delivery obtained, sec. 181.*)

verdict. *Davis v. Watkins*, 2 Bush 224. See 3 J. J. M. 64; 5 J. J. M. 235; 7 Dana 411, for decisions upon questions of interpleader before the Code.

§ 32. **Costs—security for.** If one de-

fendant be substituted for another, and security for costs not given at the time, it will be considered waived, unless party was taken by surprise. *Gunn v. Gudehus*, 15 B. M. 447.

CHAPTER III.

ACTIONS CONCERNING MARRIED WOMEN.

§ 34. Married women—actions by and against.

1. When may sue and be sued.
2. Husband to be joined—when.
3. Defense of actions by.
4. Desertion by husband.
5. Marriage—effect of.
6. Practice if of unsound mind or imprisoned.

§ 34 ^(49 to 52) **Married women—actions by and against.** 1. In actions between husband and wife; in actions concerning her separate property; and, in actions concerning her general property [and in actions for the personal suffering of or injury to her person or character] in which he refuses to unite, she may sue or be sued alone. (*Words in brackets inserted by act of 1892.*)

2. In all other actions by or against a wife she and her husband must join or be joined as plaintiffs or defendants.

3. She may defend an action against her and her husband for herself, and for him also if he fail to defend.

4. If a husband desert his wife, she may bring or defend for him any action which he might bring or defend, and shall have the powers and rights with reference thereto which he would have had but for such desertion.

5. If a female party to an action marry, her husband may be made a party by a motion, causing the fact to be stated upon the record; and the action shall not be delayed by reason of the marriage.

§ 34. (1) **Construction of section.** The common law rule is in force except in the cases mentioned in this section, and wife can not sue alone in any case not embraced by it. A next friend can not prosecute a suit in the name of the infant wife against the wishes of her infant husband. *Anderson v. Anderson*, 11 Bush 327.

(2) The only object of this section (49, same as sec. 34-1 of this Code), is to dispense with the necessity for a next friend where the action concerns the separate property of the wife, or is between herself and husband. It confers no new right. *Matson v. Matson*, 4 Met.

262, and see Ky. Stat., sec. 2128, conferring on wife power to sue and be sued alone in all cases.

(3) **Judgment against husband for debt of wife** made before marriage, see *Clark v. Miller*, 88 Ky. 108; *Medley v. Tandy*, 85 Ky. 566; *Fultz v. Fox*, 9 B. M. 499; *Beaumont v. Miller*, 1 Met. 68; *Agnew v. Williams*, 1 Bush 4; 6 Bush 34; 7 Bush 214. For tort of wife, see *Curd v. Dodd*, 6 Bush 681 and see Ky. Stat., sec. 2130, fixing liability of husband.

(4) **Marriage—effect of.** An infant female having married an infant pending the action, the court may make him a

6. But if a wife be of unsound mind, or imprisoned, the actions mentioned in subsections one, three and four of this section must be prosecuted or defended by her committee or curator, if she have one; and if she have none, must be prosecuted by her next friend, or defended by her guardian *ad litem*. (As to service of notice, sec. 629; see *Ky. Stat.*, sec. 2128, giving married women right to sue and be sued.)

CHAPTER IV.

PERSONS UNDER DISABILITY—PROVISION CONCERNING.

§ 35. Action—by whom brought.

§ 36. Defense by—judgment—guardian *ad litem*.

§ 37. Next friend, qualifications of; Liability for costs.

§ 38. Guardian *ad litem*—appointment—duties—compensation.

§ 35 (ss. 52) Action—by whom brought. Excepting married women—

1. The action of a person who is under disability must be brought by his guardian, curator, or committee, if he have one residing in this State, unless it be against his guardian, curator, or committee; or unless said guardian, curator, or committee refuse to sue, in which case he must be made a defendant.

complaint and allow action to proceed in name of her next friend as next friend of both. *Hopkins v. Virgin*, 11 Bush 677. The mere suggestion of the marriage of female parties is all that is necessary to enable the court to make the husbands parties. *Dickinson v. Trout*, 8 Bush 441.

(5) **Personal judgment against married woman forbidden.** It was held in *Sweeney v. Smith*, 15 B. M. 325; *Agnew v. Williams*, 1 Bush 4; *Adams v. Jett*, 6 Bush 585; 6 Bush 659, and other cases, that a personal judgment could not be taken against a married woman; but see now *Ky. Stat.*, sec. 2128, permitting married woman to be sued as a single woman.

(6) **Right of wife to sue husband.** It was held in *Kalfus v. Kalfus*, 92 Ky. 542, that a wife could not maintain an action at law against her husband; and in *Moore v. Settle*, 82 Ky. 187, that she could not maintain in her own name an action to

recover money won from her husband at gaming. Can she now maintain these actions? See *Ky. Stat.*, sec. 2128.

§ 35. (1) **Action in name of infant.** Actions should be prosecuted in the name of the infant by the guardian or next friend. *Wilson v. Unsell*, 12 Bush 215; *Anderson v. Watson*, 3 Met. 509; but a guardian may sue in his own name in some cases, as upon a note taken payable to himself. *McChord v. Fisher*, 13 B. M. 194; 3 Met. 510; and see sec. 21.

(2) **Guardian of infant** must prosecute and defend actions for him, unless he declines, and in such case the infant may appear by his next friend, making guardian defendant. *Miller v. Cabell*, 81 Ky. 178; *McMakin v. Stratton*, 82 Ky. 226; and the court has no power except for good cause to displace the guardian and permit next friend or guardian *ad litem* to represent infant. *Walker v. Smyser*, 80 Ky. 620; 81 Ky. 178.

2. The action of an adult, who is imprisoned in or out of this State, and who has no curator residing herein, or his action against his curator, may be brought by him, or, with his consent, by his next friend.

3. The action of an infant, or of a person of unsound mind, who resides in this State, and who has no guardian, curator, or committee residing herein, or whose guardian, curator, or committee refuses to sue, or his action against his guardian, curator, or committee, may be brought by his next friend.

4. The action of an infant, or of a person of unsound mind, who resides in a foreign country, and who has a guardian, curator, or committee residing therein, may be brought by such guardian, curator, or committee, or by his next friend.

(3) **Guardian and next friend.** The fact that an infant sues both by his guardian and next friend may be grounds for special demurrer, but is not a reversible error unless it appear that the rights of the infant have been prejudiced. *Henning v. Barringer*, 10 R. 674.

(4) **Infants—actions by.** Agreement of infant plaintiff to dismiss action must be pleaded, and can not be made available by motion. *Hopkins v. Virgin*, 11 Bush 677.

(5) Poor infant and insolvent next friend will be permitted to prosecute an action without securing costs, as provided in sec. 619. *Westerfield v. Wilson*, 12 Bush 125; and see sec. 37-2.

(6) Infant seeking to avoid contract on ground of fraud can not avail himself of his infancy unless he pleads it. *Bryant v. Pottinger*, 6 Bush 473.

(7) Next friend of infant female can not prosecute an action in her name against wishes of her infant husband. *Anderson v. Anderson*, 11 Bush 327; and where an infant plaintiff intermarries with an infant husband it is proper to enter him as coplaintiff and allow action to proceed in name of her next friend as next friend of both. *Hopkins v. Virgin*, 11 Bush 677.

(8) **Next friend** can not commute debts or judgments due infant. *Forbes v. Brents*, 1 J. J. M. 441; and next friend may be changed by leave of court. *Burks v. Shain*, 2 Bibb 341.

(9) **Non-resident guardian** has no power to sue for the infant or otherwise act as guardian in this State, unless authorized by a county court of this State, as provided by sec. 2041 Ky. Stat. (which is copy of sec. 16, art. 2, chap. 48, Gen. Stat.). *Watts v. Wilson*, 93 Ky. 495; and see *Williams v. Duncan*, 92 Ky. 125; *Shelby v. Harrison*, 84 Ky. 144.

(10) **"Person of unsound mind,"** as used in this section, embraces not only lunatics but persons whose minds have become so impaired by disease or other cause as to be unable to take care of their own interests. *Howard v. Howard*, 87 Ky. 616.

(11) If a person alleged to be of unsound mind appears and protests that he is not incapable of managing his estate and that suit is prosecuted without his authority, the chancellor should impanel a jury to pass upon the question of his capacity. *Howard v. Howard*, 87 Ky. 616.

(12) The trustee of a lunatic having sold his land and appropriated the proceeds, a creditor of the lunatic sued his sureties to recover the money. A successor of the trustee, having subsequently brought suit to have sale set aside as fraudulent, it was held that he and not creditor had right to choose remedy and maintain action. *Trunk v. Eastern Asylum*, 6 R. 521.

§ 36 [55, 60, 65] **Defense by—judgment—guardian ad litem.** Excepting married women, if a defendant, who is under disability and who is summoned in this State, have a defense—

1. That of an infant or person of unsound mind must be made by his guardian or committee, or by a guardian *ad litem*.

2. That of an adult prisoner in this or any other State must be made by his curator or by an attorney employed by him, or by a guardian *ad litem*.

3. No judgment shall be rendered against an infant—other than a *feme covert*—nor against a person of unsound mind, who is summoned in this State, until the regular guardian, or committee, or guardian *ad litem* of such defendant shall have made defense, or have filed a report, stating that, after a careful examination of the case, he is unable to make defense. His report, that he can not

§ 36. (1) **Clerical misprision.** Where no defense is made for infants or report of guardian *ad litem* filed, the judgment against them, as provided in sec. 517, is a clerical misprision, and the error can not be considered on appeal until motion is made in lower court to correct it as directed in sec. 516. *Morrison v. Beckman*, 16 R. 294.

(2) **Guardian ad litem—duty of court.** Action should not be dismissed because plaintiff neglects to have a guardian *ad litem* appointed for the infant defendants. It is the duty of the court to appoint one whether the plaintiff does or does not apply, and where an action is submitted before appointment of guardian *ad litem* court should set aside submission and appoint. *C. & L. R. R. Co. v. Bowler*, 9 Bush 468.

(3) Guardian *ad litem* should be appointed in bastardy proceeding. *Chandler v. Com.*, 4 Met. 66.

(4) Answer of guardian *ad litem* sufficiently complies with Code, although statement "that after careful examination of case he is unable to make defense" is not found in the body of answer, but in jurat thereto. *Vissman v. Bryant*, 14 R. 874.

(5) **Guardian should conduct defense** for his wards although a guardian *ad litem* may have been appointed, unless there is some valid reason for denying him the right. *Walker v. Smyser*, 80 Ky. 620;

Miller v. Cabell, 81 Ky. 178; but the court may appoint a guardian *ad litem* to defend, although there be a guardian. *McMakin v. Stratton*, 82 Ky. 226.

(6) **Infant—appeal by—bar.** Infant after becoming twenty-one prosecuted an appeal to reverse judgment rendered during infancy; the judgment was affirmed. As to any matter which was or could have been heard on the appeal, the judgment of affirmance is a bar to petition filed to vacate judgment appealed from. *Speak v. Mattingly*, 4 Bush 310, and see *Maddox v. Williams*, 87 Ky. 147, and notes sec. 301.

(7) **Infants—judgment against** before answer filed by guardian or guardian *ad litem* is error. *Curd v. Williams*, 13 R. 855; *Allsmiller v. Freutchenicht*, 86 Ky. 198; but if judgment is rendered after infant arrives at age it will be valid, although no guardian or guardian *ad litem* appeared for him during infancy. *Coffey v. Proctor Coal Co.*, 14 R. 415.

(8) In *Keller v. Wilson*, 90 Ky. 350, it is held that a judgment against infants who were not represented by either statutory guardian or guardian *ad litem* was only erroneous, not void; in *Morrison v. Beckham*, 16 R. 294, such judgment is held to be misprision.

(9) It was held that where an infant was before the court by actual process, prior to amendment to sec. 52, a judgment for the sale of his land without

make a defense, must be filed on or before the day for making defense, unless, for cause shown, the court extend the time; and failure to file such report, as required hereby, or by the court, shall be punished as a contempt. (*When defense must be filed, sec. 102; judgment before filed, vacated, secs. 517, 519; time allowed infant to vacate, sec. 391.*)

§ 37 (ss. 55) Next friend, qualifications of—liability for costs. 1. No person shall sue as next friend unless he reside in this State and be free from disability, nor unless he file his own affidavit showing his right to sue as next friend according to the provisions of this chapter.

appointment of guardian *ad litem* was voidable, not void. *Schuk v. Stoll*, 6 R. 364.

(10) **Infants owning distinct claims can not be sued jointly** or be united as defendants in an action against them and a person who is guardian for all of them. The cause of action against each being separate and distinct, they must be sued separately. *St. Joseph O. S. v. Wolpert*, 80 Ky. 86.

(11) **Infant plaintiffs.** Under this Code are infant plaintiffs placed on same footing as adults? See sec. 116-2, sec. 126-1-2, secs. 391, 574, sec. 743-1, sec. 745, sec. 756-2. Under Code of 1854 it was held that judgment on counterclaim against infant plaintiff before defense by guardian *ad litem* was fatally erroneous. *Smith v. Ferguson*, 3 Met. 423.

(12) **Infant who has arrived at age** may answer for himself, although his guardian *ad litem* had answered for him while an infant. *Mitchell v. Berry*, 1 Met. 602; and an infant whose action is prosecuted by a next friend may, upon arriving at age, be substituted as plaintiff by a suggestion on the record. *Clements v. Ramsey*, 9 R. 172.

(13) **Non-resident infant.** Judgment against infant defendant constructively summoned without appointment of guardian *ad litem*, and before defense, is not void. *Simmons v. McKay*, 5 Bush 25. It is not necessary to have guardian *ad litem* appointed for non-resident infant. Sec. 36-3. The appointment and answer of corresponding attorney is all that is required. Sec. 59-7.

(14) **Practice.** Consent order that infants be made parties does not dispense with service of process upon them, or authorize judgment against them without defense by a guardian. *Pond v. Doneghy*, 18 B. M. 558.

(15) **Presumption.** Where the record is lost, but it appeared that an answer was filed for infants who were very young, the presumption is that it was filed by their guardian. *Johnson v. McDyer*, 11 R. 28.

§ 37. (1) Affidavit—next friend. It is too late after answer filed to make motion to dismiss for want of affidavit, and an affidavit tendered when motion is made should be received. *Staton v. Bryant*, 5 R. 426.

(2) **Next friend.** An action instituted by the next friend was prosecuted to judgment by him after the arrival of infant at age and the affidavit required by this section was not made. It was held too late after judgment to make objection. *Bramel v. Cunningham*, 3 R. 512. Objection that next friend is a non-resident can not be made by general demurrer. *Stevenson v. Stevenson*, 7 R. 680; the proper practice is to raise question by rule or motion. *Hall v. Snipes*, 10 R. 435.

(3) **Poor infant—costs.** Poor infant and insolvent next friend will be permitted to prosecute an action without securing costs. *Westerfield v. Wilson*, 12 Bush 125; an infant who is unable to procure a next friend may institute an action in his own name and the court may appoint a next friend for him and allow him to sue *forma pauperis*. *Richardson v. Hunt*, 5 R. 931.

2 [54, 55] A guardian, curator, committee, or next friend who brings or prosecutes an action for a person who is under disability is liable for the costs which accrue during his conduct of the action, unless he be allowed to sue in *forma pauperis*, by an order of the court, or by an order of the judge thereof during vacation. (*Meaning of "disability," sec. 732-31; when required to secure costs, sec. 619.*)

§ 38. **Guardian ad litem—appointment—duties—compensation.** 1. No appointment of a guardian *ad litem* shall be made until the defendant is summoned, or until a person is summoned for him, as is authorized by section fifty-two, nor until an affidavit of the plaintiff, or of his attorney, be filed in court, or with the clerk, or presented to the judge during vacation, showing that the defendant has no guardian, curator, nor committee, residing in this State, known to the affiant.

2 [56, 59, 61] A guardian *ad litem* must be a regular, practicing attorney of the court; and may be appointed by the court, or the judge thereof, whether a guardian, curator, or committee appear for the defendant or not; or by the clerk of the court, during vacation, if the affidavit mentioned in subsection one of this section be filed. The guardian *ad litem* may be appointed upon the motion of the plaintiff or of any friend of the defendant; but neither the plaintiff nor his attorney shall be appointed, nor be permitted to suggest the name of the proposed guardian *ad litem*; and the court or judge may change the guardian so appointed whenever the interest of the infant may appear to require such change.

3. It shall be the duty of the guardian *ad litem* to attend properly to the preparation of the case; and in an ordinary action he may cause as many witnesses to be subpœnaed as he may think

§ 38. (1) **Affidavit—appointment.** It was held in *McMakin v. Stratton*, 82 Ky. 226, not to be a reversible error in that case to appoint a guardian *ad litem* although no affidavit was filed.

(2) Clerk to appoint when affidavit required by sec. 52 is filed, and if petition states required facts and is verified, affidavit is not necessary. *Tyler v. Jewell*, 10 R. 887.

(3) The appointment of a guardian *ad litem* before the infants are summoned is void, and does not bring them before the court. *Allsmiller v. Freuchtenicht*, 86 Ky. 198; *Lawrence v. Connor*, 12 R. 86; *Beverly v. Perkins*, 1 Duv. 251.

(4) The affidavit for appointment of guardian *ad litem* may be made by either

the plaintiff or his attorney, whether the plaintiff is in or out of the county. *James v. Cox*, 88 Ky. 270; see further as to sufficiency of affidavit objected to because certain words were inserted and others omitted, *Donaldson v. Stone*, 11 R. 27.

(5) **Fees.** When the infant upon a counter-claim or set-off recovers judgment against the plaintiff, it is proper to require the plaintiff to pay fee of guardian *ad litem*, but he should receive credit on judgment by it. *Huhlein v. Huhlein*, 87 Ky. 247; and see further, *Williamson v. Williamson*, 1 Met. 303.

(6) **Guardian ad litem may appeal** in the name of and for the benefit of the infants. *Reed v. Louisville Bridge Co.*, 8 Bush 69.

proper, subject to the control of the court; and in an equitable action he may take depositions, not, however, exceeding three, without leave of the court.

4 [44] The court shall allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiff and taxed in the costs. The affidavit of such guardian, or of another person, or other competent evidence, is admissible to prove the services rendered, but not to prove their value. The court must decide concerning such value, without reference to the opinions of parties or other witnesses. (*Form of affidavit page 627; when attorney can make, sec. 550- , ; not required to pay for depositions, sec. 583.*)

TITLE IV.

COMMENCEMENT OF A CIVIL ACTION.

CHAPTER I. MANNER OF COMMENCING AN ACTION, 39.

II. SERVICE OF SUMMONS, 47.

1. ACTUAL SERVICE, 47.
2. CONSTRUCTIVE SERVICE, 57.

CHAPTER I.

MANNER OF COMMENCING AN ACTION.

- § 39. Action—how commenced.
- § 40. Summons—form and requisites of.
- § 41. Summons to any county—costs.
- § 42. Copy for each defendant.
- § 43. Time fixed in for return.
- § 44. Return day of summons.
- § 45. Delivery to officer.
- § 46. Sheriff to attend clerk's office daily.

§ 39 [44] **Action—how commenced.** An action is commenced by filing, in the office of the clerk of the proper court, a petition stating the plaintiff's cause of action; or, in cases wherein written pleadings are

§ 39. (1) **Duty of clerk** to issue summons, and when plaintiff has filed his petition he has the right to rely on the clerk issuing summons in proper manner, and can not be prejudiced by failure of clerk to do his duty in this respect. *L. & N. R. R. v. Smith*, 87 Ky. 501.

(2) **Lost summons.** How supplied, see Ky. Stat., sec. 3994.

(3) **Summons—commencement of action.** Issuing the summons is commencement of action; filing petition without causing summons to issue on it does not stop statute of limitation, or create *lis pendens*.

not required, by filing in such court the account, or the written contract, or a short written statement of the facts on which the action is founded; and, in either case, by causing a summons to be issued, or a warning order to be made, thereon. (*Clerk must indorse time of filing, sec. 669; when written pleadings not required, sec. 705; when summons may issue on holiday, sec. 665; when and how warning order made, secs. 57-58.*)

§ 40 (80) **Summons—form and requisites of.** The summons shall command the officer to whom it is directed to summon the defendant named therein to answer the petition filed by the plaintiff, giving his name, at a time stated therein, under the penalty of the petition being taken for confessed, or of the defendant being proceeded against for contempt of court on his failure to do so. The summons shall be dated the day it is issued and be signed by the clerk. (*Form of, page 624; to whom directed, sec. 667.*)

§ 41 (81) **Summons to any county—costs.** A summons shall be issued at any time, to any county, against any defendant, at the plaintiff's request. But a summons not served shall not be taxed in the costs unless otherwise ordered by the court.

§ 42 (82) **Copy for each defendant.** With every summons the clerk shall issue a copy thereof for each defendant named therein, unless otherwise ordered by the plaintiff.

§ 43 (83) **Time fixed in for return.** The time fixed in the summons for the defendant to answer shall be the day the summons is returnable. (*When answer must be filed, sec. 102.*)

Ky. Stat., sec. 2524; Butts v. Turner, 5 Bush 435; Trabue v. Sayre, 1 Bush 129; Cecil v. Sowards, 10 Bush 96; 83 Ky. 149.

(4) **Waiver of service—filing answer is.** Elliott Co. v. Kitchen, 14 Bush 289; so is prosecuting appeal. Thompson v. Moore, 91 Ky. 80; or filing exceptions to commissioners' report. Newman v. Moore, 94 Ky. 147; or filing demurrer. Underwood v. Wood, 93 Ky. 177.

§ 40. (1) **Amended petition.** Summons must issue on amended petition presenting new and distinct cause of action. Rutledge v. Vanmeter, 8 Bush 354; 10 Bush 544; Dameron v. Osenton, 6 R. 218; Ky. Eclectic Institute v. Gaines, 8 R. 257; see further, notes to sec. 132, and C. S. R. R. Co. v. Hogan, 7 R. 820.

(2) **Attestation of officer.** It is the at-

testation of the officer who issues writ that gives validity to it; and in conflict between words in body of writ over official signature and unattested indorsement on back, attested words must prevail. Peters v. Conway, 4 Bush 565; and see Northern Bank v. Hunt, 93 Ky. 67.

(3) **Form and requisites.** Process which does not run in name of "Commonwealth of Kentucky" is void; words and dates should not be abbreviated. Yeager v. Groves, 78 Ky. 278; and summons should name defendants to be summoned, a process commanding an officer to summons the unknown heirs of a certain person is invalid. Kellar v. Stanley, 86 Ky. 240; sec. 44, fixing time when summons is returnable, is only directory. L. & N. R. Co. v. Smith, 87 Ky. 501.

§ 44 (70) **Return day of summons.** The summons shall be returnable to the first day of the next term of the court, which does not begin within ten days from the date of the summons.

§ 45 (71) **Delivery to officer.** The summons and copies shall be delivered to the sheriff or other officer authorized to execute it. (*Sheriff to indorse time of reception, sec. 674; officers authorized to execute, sec. 667.*)

§ 46 (72) **Sheriff to attend clerk's office daily.** It shall be the duty of the sheriff, or of one of his deputies, to attend at the clerk's office daily—Sundays excepted—to receive any process that may be issued, and the clerk shall deliver to him any process remaining in his office.

CHAPTER II.

SERVICE OF SUMMONS.

ARTICLE 1. ACTUAL SERVICE, 47.

2. CONSTRUCTIVE SERVICE, 57.

ARTICLE 1.

ACTUAL SERVICE.

- § 47. Summons—who may serve.
- § 48. Manner of serving.
- § 49. Return—facts to be stated in—penalty.
- § 50. Acknowledgment of service.
- § 51. County—city—corporation—carrier.
- § 52. Infant under fourteen.
- § 53. Person of unsound mind.
- § 54. Prisoner—service on.
- § 55. Shakers—service on.
- § 56. Non-residents—except infants.

§ 47 (73) **Summons—who may serve.** The summons may be served—
1. By the officer to whom it is directed, or any officer to whom

(4) A summons against "Thos. H. Hunt & Co." is not void, when Thos. H. Hunt is a defendant in the petition. *Northern Bank v. Hunt*, 93 Ky. 67.

(5) Order of attachment indorsed on back of summons is valid. 93 Ky. 67.

§ 44. (1) **Construction of section** and holding it to be directory and not mandatory. *L. & N. R. Co. v. Smith*, 87 Ky. 501.

(2) **Sunday to be counted** in determining whether or not process executed in time. *Ormsby v. Louisville*, 79 Ky. 197.

§ 45. **Officers who may execute.** Plaintiff has a right to have summons directed to and executed by any officer authorized to execute, at his option. *Boaz v. Nail*, 2 Met. 245; and summons directed to sheriff or other officer may be executed by constable or any officer to whom it might have been directed. *Long v. Gaines*, 4 Bush 353; and see secs. 47, 667.

§ 47. (1) **Special bailiff.** Parol authority is not sufficient to authorize a special bailiff to execute a summons, and written authority after service will not render

it might have been directed, and his return thereon shall be proof of the time and manner of service.

2. By any person appointed by the officer to whom it is directed, by an indorsement on the summons; and the affidavit of such person indorsed thereon shall be proof of the time and manner of service. (*What officers may serve, sec. 667; court may appoint person, sec. 668; amendment of return, sec. 49.*)

§ 48 [74] **Manner of serving.** Unless otherwise provided, the summons shall be served by delivering, or if acceptance be refused, by offering to deliver a copy of it to the person to be summoned. (*When may be served on holiday, sec. 665.*)

the service valid. *Thompson v. Moore*, 91 Ky. 80; and see sec. 667 and notes thereto.

(2) There must be a substantially strict compliance with the statute in returns made by a special bailiff, the presumptions in favor of the return of an officer do not exist, the affidavit of the special bailiff must be signed by him or it will not be sufficient. *Simms v. Simms*, 88 Ky. 643; but return showing how and when summons was executed is sufficient. *Barbour v. Newkirk*, 83 Ky. 529.

(3) Special bailiff can not execute summons out of the county in which he reside and is appointed. *Lillard v. Brannin*, 91 Ky. 511. See further as to special bailiffs, sec. 4562 Ky. Stat., in substance the same as this section.

(4) When a special bailiff returns a summons "not found," new authority in writing is necessary to enable him to execute an alias summons. 91 Ky. 80.

(5) Deputy sheriff can appoint special bailiff to execute summons, but appointment should be in name of principal by deputy. *Norman v. Norman*, 6 Bush 495.

§ 48. (1) **False return.** Where a summons has been returned as executed, when in fact it was not, and judgment rendered thereon, the return is conclusive, if the plaintiff acted in good faith, and can not be impeached in proceeding to set aside judgment. *Thomas v. Ireland*, 88 Ky. 581; *Everett v. Ragan*, 1 R. 421; but if false return has been made by mistake of officer and default judgment rendered thereon, the return may be

questioned in proceeding to enjoin collection of judgment. *Bramlett v. McVey*, 91 Ky. 151; and see *Board v. Helm*, 2 Met. 500.

(2) **Fraud—service procured by void.** Service of process upon defendant who has been brought within the reach of the court by the fraudulent representations of the plaintiff confers no jurisdiction to render judgment. *Wood v. Wood*, 78 Ky. 624.

(3) **Holiday—Sunday.** It was held under Code of 1854 that process executed on Sunday was a nullity; that the holiday mentioned in that Code did not mean Sunday. *Moore v. Hagan*, 2 Duv. 437. This Code (sec. 665) uses the word "Sunday" as well as holiday.

(4) **"Not found."** Return of not to be made until officer has visited residence of defendant. Ky. Stat., sec. 4566.

(5) **Officers who can execute.** Summons directed to a sheriff or constable may be executed by any officer to whom it might have been directed. *Long v. Gains*, 4 Bush 353; *Boaz v. Nail*, 2eMet. 245, and secs. 47, 667.

(6) **Return of officer.** Summons returned "executed" with no signature to the return is not sufficient evidence of service without other proof. *Long v. Montgomery*, 6 Bush 394.

(7) Return of "executed on J. H. C. by reading the within," is not sufficient return on summons. When the officer returns summons executed, the presumption will be, it is done according to law; but when the return shows how it was executed, that presumption can not arise.

§ 49 ^[70] **Return—amendment of—penalty.** The return or affidavit mentioned in section forty-seven must state when and how the summons was served, and, if erroneous, may, with leave of the court, be amended according to the truth. An officer who makes such erroneous return may be fined by the court not exceeding ten dollars, and shall be liable to the person aggrieved for any injury caused by the error. (*Clerk to enter return on docket—effect of, sec. 670.*)

§ 50 ^[70] **Acknowledgment of service.** Service may be acknowledged by the person to be summoned by an indorsement upon the summons, signed and dated by him, and attested by a witness. The affidavit of the witness shall be proof of the service.

Case v. Colston, 1 Met. 145; Webber v. Webber, 1 Met. 18; 1 Duv. 251.

(8) Summons returned "executed by delivering a true copy to John Long," will be presumed to have been executed on the defendant John Long. Long v. Gains, 4 Bush 353. And if summons is lost, this court will rather presume that it was executed than that judgment was rendered without service of process. Jones v. Edwards, 78 Ky. 6; 6 R. 523.

(9) The presumption in favor of a return made by an officer does not arise when the return is made by one not an officer—a special bailiff. Lloyd v. McCauley, 14 B. M. 535. See also 83 Ky. 520, and notes to sec. 47.

(10) Mistake in date of execution—presumption. King v. Spearman, 3 B. M. 289.

(11) Officer's return is not conclusive before judgment, and defendant may contradict it and show such defect as will prevent court from taking jurisdiction. Motions or answer filed to show want of jurisdiction will not enter appearance. Barbour v. Newkirk, 83 Ky. 520; C. & O. R. Co. v. Heath, 87 Ky. 651.

(12) Where the petition stated who the mother of infant defendants was, and that she was their custodian, the failure of officer to state in return that he executed summons on mother and custodian does not invalidate judgment. Bailey v. Fanning, 12 R. 644.

(13) Reading summons to defendant

is not sufficient service. The officer must deliver or offer to deliver copy. Case v. Colston, 1 Met. 145.

(14) **Sheriff party—service by void.** Service of summons by sheriff in a suit in which he is a party is a nullity. Knott v. Jarboe, 1 Met. 504.

(15) **Special bailiff—appointment of.** Deputy sheriff can appoint special bailiff to execute summons, as provided in subsec. 2 of section 47. In such case the deputy should make the appointment in name of his principal, as well as his own name. Norman v. Norman, 6 Bush 495.

§ 49. (1) **Amendment of return.** Sheriff may amend his return by leave of court, even after his term of office expires. Newton v. Prather, 1 Duv. 100; and after judgment has been rendered. Thompson v. Moore, 91 Ky. 80; Tyler v. Jewell, 10 R. 887.

(2) **Answer waives service.** Filing answer waives right to object to want of legal service. Elliott Co. v. Kitchen, 14 Bush 289; and see further as to waiver, note 4, sec. 39.

(3) **Clerk's entry of return on docket** when summons is lost is entitled to more weight than recollection of defendant and sheriff. Lemming v. Mullins, 6 R. 523.

(4) **False return.** See note 1, sec. 48.

(5) **Special bailiff—service by.** See notes to sec. 47.

(6) **Sufficiency of return.** See notes 6-11, sec. 48.

§ 51 [171-501] **County—city—corporation—carrier.** 1. In action against a county the summons must be served on the presiding judge of the county court, or, if he be absent from the county, upon its attorney.

2. In an action against a municipal corporation the summons must be served upon its mayor or the chairman of its board of trustees; or, if he be absent from the county, upon the defendant's official attorney, if it have one; or, if it have no such attorney, upon its marshal.

3. In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this State; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein; [or if the defendant operate a railroad, it may be served upon the defendant's passenger or freight agent stationed at or nearest to the county seat of the county in which the action is brought.] (*Words in brackets added by act 1893.*) (*Service of process on insurance company. See Ky. Stat., sec. 631.*)

4. [In every action] against a common carrier, the summons may be served, in any county, upon the defendant's chief officer or agent; or it may be served, in the county wherein the action is brought, upon the defendant's chief officer or agent who resides therein; or, if the defendant operate a railroad, it may be served upon defendant's passenger or freight agent stationed at or nearest to the county seat of the county in which the action is brought. (*Words in brackets inserted by act 1893.*)

5. Where the defendant corporation is the owner or the lessee of a railway in this State, or the builder or constructor of a railway in this State, and can not be served with summons under existing laws, then the person or corporation controlling or operating the railway so owned or built or constructed shall be treated as the representative of the defendant, and service of summons upon such of the officers or agents of the persons or corporation operating or controlling the railway as would be required if such controller or operator were the party sued, shall be a sufficient service of summons upon the defendant to the action, but such service must be twenty days before the commencement of the term, and the facts

§ 51. (1) Amendment inserted as subsection five is constitutional. M. & B. S. R. v. Shofstall, 15 R. 632.

(2) Common carrier. As to service of summons in action against on contract,

see N. O. & St. L. R. v. Carrico, 95 Ky. 489; in tort see Sherrill v. C. O. & S. R. Co., 89 Ky. 302; Harper v. N. N. & M. V. R., 90 Ky. 359; C. O. & S. W. R. v. Heath, 87 Ky. 651; C. & O. R. v. Cowherd, 16 R. 373.

authorizing the same must be made to appear by the return of the officer or the affidavit of some person other than the plaintiff in the action, and the appearance of the defendant to move for the quashal of the service of the summons shall operate as an appearance for all the purposes of the action, and the same shall stand for trial at the succeeding term of the court in case the motion to quash shall prevail. (*This subdivision added by act 1890.*)

6. In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred. (*This subdivision added by act 1893.*) (*Venue of action against corporation, secs. 71, 72, 75; against common carrier, sec. 73; who is "chief officer or agent," meaning of "resides," sec. 732.*)

§ 52 (1) **Infant under fourteen.** If the defendant be under the age of fourteen years the summons must be served on his father; or, if he have no father, on his guardian; or, if he have no guardian, on his mother; or, if he have no mother, on the person having charge of him.

(3) In an action brought pursuant to sec. 73 against a common carrier, summons may be served in the county where action is brought upon the defendant's chief officer or agent who resides therein. *Adams Ex. Co. v. Crenshaw*, 78 Ky. 136; as to service on general ticket or passenger agent, see *C. & O. R. R. v. Cowherd*, 16 R. 373.

(4) **Insurance company.** Service of process on insurance commissioner in action against. *Ky. Stat.*, 571; and see further as to venue of action and service of process, *Ky. M. S. Co. v. Logan*, 90 Ky. 364.

§ 52. (1) **Clerk to appoint guardian ad litem** when required affidavit is filed, or when petition states necessary facts and is verified. *Tyler v. Jewell*, 10 R. 887.

(2) **Decisions under 1854 Code** as to proper service. *Morrison v. Garrott*, 15 R. 305; 86 Ky. 615.

(3) **Delivery of copies.** The delivery of one copy for all the infants named therein to the person authorized to be served with process for them is sufficient. *Cheatham v. Whitman*, 86 Ky. 615; *Donaldson v. Stone*, 11 R. 27.

(4) **Person in charge of infant**, although under twenty-one, may be served with summons. *Lawrence v. Conner*, 12 R. 86.

(5) **Return of officer.** In action against an infant whose father was dead, the officer's return, showing that summons was executed upon infant and his mother, is sufficient, nothing appearing in the record to show he had a guardian. It will be presumed officer did his duty. *Webber v. Webber*, 1 Met. 18; and see 86 Ky. 615; 12 R. 644; 11 R. 27.

(6) Return of special bailiff, showing that he executed process upon infant and his mother, without showing that father or guardian could not be found, is not sufficient. *Lloyd v. McCauley*, 14 B. M. 535. The court refrain from saying whether such a return made by an officer would be sufficient. The Code of 1854 provided that if neither the father nor guardian could be found, summons might be executed on mother. 80 Ky. 64.

(7) The return of sheriff on a summons against infant defendants, that he executed it by delivering a copy to each of the persons named in it, negatives the

[If any of the parties upon whom summons is directed to be served by this section is a plaintiff, then it shall be served on the person who stands first in the order named in said section, and who is not a plaintiff; and if all such persons are plaintiffs, it shall, on the affidavit of one or more of them showing that fact, be the duty of the clerk of the court to appoint a guardian *ad litem* for the infant, and the summons shall be served on such guardian.] (*Words in brackets added by act 1882.*)

§ 53 (181) **Person of unsound mind.** If the defendant be of unsound mind the summons must be served on him and on one of the following named persons, if residing in the county, viz.: on his committee; or, if he have no committee, on his father; or, if he have no father, on his guardian; or, if he have no guardian, on his wife; or, if he have no wife, on the person having charge of him; or, if the defendant be a married woman of unsound mind, and her husband be plaintiff in the action, the summons must be served on her and her committee; or, if her husband be not plaintiff in the action, upon her and her committee, if she have one; or, if she have no committee, upon her and her husband: *Provided*, That the summons shall not be served upon a person of unsound mind, if he be under charge or treatment of a physician who certifies that, in his opinion, the service would be injurious to such person. Such certificate shall be returned with the summons.

[Service of a summons, by delivering a copy of it to the physician having charge of a person of unsound mind, shall have the same effect as a service on the person of unsound mind, if such physician gives a certificate, attested by the officer delivering him the copy, that a personal service would, in his opinion, be injurious to such person of unsound mind.] (*Words in brackets added by act of 1882; venue of action against, sec. 69.*)

§ 54 (181) **Prisoner — service on.** If the defendant be a prisoner a copy of the petition must accompany the summons, and the service must be upon the keeper of the penitentiary, who shall deliver the copies

presumption that he served it on guardian or any one except those named in it. *Beverly v. Perkins*, 1 Duv. 251; and presumption that officer did his duty is rebutted when return shows how process was executed and that it was not executed as required. *Cheatham v. Whitman*, 86 Ky. 614.

(8) Where the petition stated who

(4)

mother of infants was and that she was their custodian the failure of officer to state in return that he executed summons on mother and custodian does not render service invalid. *Bailey v. Fanning*, 12 R. 644.

(9) Amendment of return, allowable even after judgment. *Tyler v. Jewell*, 10 R. 887; and see further note 1, sec. 49.

of the petition and summons to the prisoner. And a copy of the summons must also be delivered to the curator of the defendant, if he have one; or, if he have no curator, to his wife, if he have one; or, if he have no wife, it shall be left at the place, if known, where he resided, or claimed to reside, prior to his confinement, with some person of the age of sixteen years. (*Venue of action against, sec. 69.*)

§ 55 (14) **Shakers—service on.** If the defendant be a community of Shakers, holding property in common, the service must be made by posting a copy of the summons at the door of its meeting house, and by delivering a copy thereof to some member of the community.

§ 56 (15) **Non-residents, except infants.** Excepting infants [under the age of fourteen years]—other than married women—and persons of unsound mind and prisoners, if a defendant be out of this State the plaintiff may take a copy of the petition, certified by the clerk, with a summons annexed thereto, warning him to appear and answer the petition within sixty days after the same shall have been served on him, and may cause a copy thereof to be delivered to such defendant by a person to whom he is personally known. Proof of the delivery shall be made by the affidavit of the person making it, indorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant, shall be stated. The officer before whom the affidavit is made shall certify that the affiant is personally known by him to be worthy of credit. (*Words in brackets inserted by act 1890. Venue of action against, sec. 75. This service does not authorize 'personal judgment, sec. 419.'*)

ARTICLE 2.

CONSTRUCTIVE SERVICE.

- § 57. Constructive service—warning order.
- § 58. Affidavit for warning order—effect of.
- § 59. Attorney—appointment, duties, compensation.
- § 60. Defendant deemed summoned—when—effect.
- § 61. Actual service on defendant—effect.

§ 57 (23 to 30) **Constructive service—warning order.** If the defendant be—

§ 56. Personal judgment can not be rendered on service under this section. *Griswold v. Popham*, 1 Duv. 170; *Berry v. Berry*, 6 Bush 504; sec. 419.

§ 57. (1) **Divorce proceedings.** Resident wife may sue non-resident husband for divorce. In such case no bond is necessary. *Rhym v. Rhym*, 7 Bush 316.

1. A corporation having no agent in this State, known to the plaintiff, upon whom a summons can be lawfully served; or,
2. A non-resident of this State and believed to be absent therefrom; or,
3. Have departed therefrom with intent to delay or defraud his creditors; or,
4. Have been absent therefrom four months; or,
5. Have left the county of his residence to avoid the service of a summons; or,
6. So conceal himself that a summons can not be served upon him; or,
7. If his name and place of residence be unknown to the plaintiff, the clerk shall, subject to the provisions of section fifty-eight, make upon the petition an order warning the defendant to defend the action on the first day of the next term of the court, which does not commence within sixty days after the making of the order. (*Venue of action against, sec. 75; how defendant whose name unknown described, sec. 691; form of warning order, page 625.*)

(2) It was held under Code of 1854 that court granting divorce on constructive service might award a new trial within time allowed, although party obtaining divorce should marry. *Meyar v. Meyar*, 3 Met. 297. But see sec. 414 of this Code.

(3) Husband can not proceed against his wife as a non-resident when she is absent from the State in obedience to his will, or is confined by him in an asylum or other place, with no power to return or respond to the warning order. *Newcomb v. Newcomb*, 13 Bush 544.

(4) **Judgment sustaining attachment** against non-resident defendant who does not appear, without warning order against him, is erroneous. *Allen v. Brown*, 4 Met. 341.

(5) **Strict compliance with Code necessary.** In all proceedings upon constructive service, the provisions of the Code regulating the same must be literally followed. Nothing short of a substantial compliance with every requisite will give court jurisdiction. *Brownfield v. Dyer*, 7 Bush 505. See *Jackson v. Speed*, 2 Duv. 426; *Grigsby v. Barr*, 14 Bush 330.

(6) **Summons and warning order not necessary.** In proceeding against defendant

by constructive service, the warning order is commencement of action. *Hoffman v. Brungs*, 83 Ky. 400.

(7) **Warning order.** Judgment rendered upon warning order citing defendant to appear at a term commencing less than sixty days from date of order is void, and if judgment so rendered is set aside and a subsequent judgment rendered upon same order it will be void. *Payne v. Hardesty*, 12 R. 336; *Herd v. Cist*, 14 R. 644; 7 Bush 505.

(8) Warning order is in the nature of a rule and is not a process in the meaning of the Code or that section of Constitution providing that the style of all process shall be "the Commonwealth of Kentucky." *Northern Bank v. Hunt*, 93 Ky. 67.

(9) The court may direct the clerk to enter a warning order in the order book and when it is made it is as effectual as if made by the clerk in vacation. 93 Ky. 67; and see *Hackworth v. Harlan*, 14 R. 76.

(10) Warning order is not invalid because not written on petition; it will be sufficient if made upon a separate piece of paper and attached to petition. *Harlammert v. Moody*, 15 R. 839.

§ 58 (29) **Affidavit for warning order—effect of.** 1. The clerk shall not make such warning order upon any of the grounds mentioned in subsections one, two, three, four, and seven, of section fifty-seven, except upon an affidavit of the plaintiff; or of his agent or attorney, if he be absent from the county; or of his guardian, curator, committee, or next friend, if he be under disability; or of the attorney of either of them, if absent from the county, stating the ground of the application for such order.

2. Nor shall the clerk make such order on any of the grounds mentioned in subsections one, two, and four, of section fifty-seven, unless the affidavit also state in what country the defendant, or, if the defendant be a corporation, in what country its chief officer or agent, resides or may be found, and the name of the place wherein a post-office is kept nearest to the place where the defendant or its chief officer or agent resides or may be found; or unless the affidavit state the affiant's ignorance of such of those facts as he does not know.

3. Nor shall the clerk make such order upon an affidavit of an agent or attorney of the plaintiff, stating any of the grounds mentioned in subsections one, two, four, and seven, of section fifty-seven, unless the affidavit state the affiant's belief that the plaintiff is ignorant of such of the facts as are unknown to the affiant.

§ 58. (1) **Affidavit for warning order.** Court of Appeals will not dismiss an appeal because of defect in affidavit for warning order made in that court, but will quash the order if affidavit is defective. *Arthurs v. Harlan*, 78 Ky. 138.

(2) Affidavit for warning order must state that person against whom it is made is a non-resident and believed to be absent from this State. 78 Ky. 138.

(3) The absence of affidavit for warning order from the record does not render the judgment void. The presumption is that the warning order was entered by the court as directed in the Code. *Newcomb v. Newcomb*, 13 Bush 544.

(4) The failure to state in affidavit the name of defendant's post-office or affiant's ignorance thereof did not render judgment in this case void. *Carr v. Carr*, 92 Ky. 552.

(5) A verified petition containing all the necessary averments dispenses with

necessity of affidavit. *Alley v. Hastie*, 15 R. 690. *Wilson v. Teague*, 95 Ky. 47.

(6) **Affidavit.** The failure of the clerk to sign his name to the jurat to the affidavit for warning order did not render the judgment void, as the court will presume after the absence of several years that a proper affidavit was filed before warning was made. *Sear v. Sear*, 95 Ky. 173, *Farris v. Perkins*, 16 R. 48, and see further, *Wilson v. Tague*, 95 Ky. 47, as to when judgment is not void because of defective affidavit.

(7) **Warning order** is sufficient to bring a non-resident before the court whether he be sane or insane. *Harlammert v. Moody*, 15 R. 839.

(8) As to sufficiency of warning order made under United States statute, see *Mer. Trust Co. v. South Park Co.*, 94 Ky. 271.

(9) The taking of warning order against non-resident defendant is com-

4. The clerk may make such order upon an affidavit of the plaintiff, or of his agent or attorney if he be absent from the county; or of his guardian, curator, committee, or next friend, if he be under disability; or upon the return of a summons by the proper officer, stating either of the grounds mentioned in subsections five and six, of section fifty-seven.

5. But the clerk shall not make such order upon the affidavit of an agent or attorney unless it also state the affiant's connection with the plaintiff, and the fact that he is absent from the county.

6. An affidavit made pursuant to the foregoing provisions of this section, unless it be controverted by the defendant's affidavit, shall be sufficient evidence of the facts therein stated for the support of the action as well as of the warning order. (*Form of affidavit, page 628; how and before whom made, secs. 551, 549; if several plaintiffs, how made, sec. 550; who is "chief officer or agent," meaning of "disability," sec. 732. See also, secs. 126, 409.*)

§ 59 [440, 441] **Attorney — appointment, duties, compensation.** 1. The clerk, at the time of making such warning order, shall appoint, as attorney for the defendant, a regular, practicing attorney of the court; but the court may, and for any reason which it deems good shall, appoint another attorney as a substitute for the attorney appointed by the clerk. Neither the plaintiff nor his attorney shall be appointed, or be permitted to suggest the name of, the defendant's attorney.

2. Such attorney must make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him, and must report to the court, during the first term, which does not commence within sixty days after his appointment, the result of his efforts.

3. The duties and powers of such attorney are governed by the last foregoing paragraph unless he be employed by the defendant; or unless he be unable to inform the defendant concerning the

mencement of action as to him; no summons is necessary. *Hoffman vs. Brungs*, 83 Kv. 400.

(10) Warning order made within a reasonable time after affidavit filed is sufficient—in this case warning order was made day after affidavit was filed. *Cornwall v. Falls City Bank*, 92 Ky. 381.

§ 59. (1) **Appearance—appeal enters.** Prosecution of appeal by non-resident enters appearance. *Gill v. Johnson*, 1

Met. 649; *Salter v. Dunn*, 1 Bush 311; 4 Met. 341.

(2) Person constructively summoned who appears for first time by appealing from judgment against him will only be held to have appeared in lower court on day mandate is entered, and no judgment can be rendered against him at that term. *Beazley v. Maret*, 1 Bush 466.

(3) An attorney for the plaintiff should not in any case be allowed to enter the

action; or unless he learn that the defendant is under disability, other than coverture, or other than infancy and coverture combined.

4. Such attorney, if employed by the defendant, shall so report to the court; and such report shall be treated as an appearance of the defendant in the action.

5. If such attorney can not inform the defendant concerning the action, or if he learn that the defendant is under disability, other than coverture, or other than infancy and coverture combined, he shall so report to the court, and shall make an affirmative defense if he can; or, if he can not make such defense, he shall so report to the court, and shall be subject, with reference to such report, to the provisions of subsection three of section thirty-six; and no act of his shall be treated as an appearance of such defendant.

6. The provisions of subsection four of section thirty-eight apply with reference to the compensation of such attorneys.

7. No judgment shall be rendered against such defendant if under any disability, other than coverture, or infancy and coverture combined, until a defense or report shall have been filed

appearance of the defendant. *Ball v. Poor*; 81 Ky. 26; and see notes to sec. 410.

(4) **Answer enters appearance.** Non-resident who by his attorney files an answer sworn to by him in another State must be regarded as personally before the court, although he disclaims in answer any intention of entering his appearance. *Tip-ton v. Wright*, 7 Bush 448.

(5) **Attorney employed by non-resident** should so state in his report, and when he fails to do this it will not be presumed that he has been employed. *Christie v. Garrity*, 14 R. 910.

(6) **Attorney—allowance to.** No allowance should be made to attorney for non-resident appointed by the court when he is acting under contract with the non-resident and looking to him for compensation. *Cabell v. Cabell*, 1 Met. 319.

(7) No allowance should be made to an attorney appointed to defend for non-resident when no report is filed by him or duty performed. *Southwood v. Myers*, 3 Bush 681; *Jackson v. McElroy*, 2 Bush 132.

(8) **Failure to appoint—effect of.** The court say: "And, although the failure to appoint the attorney (for non-resident) or to take the bond required by sec. 440 (410) are reversible errors, the jurisdiction being complete, the judgment will not be void." *Thomas v. Mahone*, 9 Bush 111.

(9) **Judgment—attorney can not consent to.** Attorney appointed for non-resident has no authority to consent to judgment against him unless employed by him; and recital in judgment that it is rendered by consent will not sustain it. *Anderson v. Sutton*, 2 Duv. 480; and see *Ball v. Poor*, 81 Ky. 26.

(10) **Report not filed.** Failure of attorney appointed to defend for non-resident to make defense or file report is not reversible error, and does not affect validity of steps taken by the court. *Brown v. Early*, 2 Duv. 369; *Ball v. Poor*, 81 Ky. 26; *Morrison v. Beckham*, 16 R. 294. See subsec. 7, this section, as to necessity for defense or report if non-resident is an infant.

pursuant to subsection five of this section. (*Executing bond for attached property is appearance, sec. 690; personal judgment can not be rendered, sec. 419.*)

§ 60 (12) **Defendant deemed summoned when—effect.** A defendant against whom a warning order is made and for whom an attorney has been appointed shall be deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

§ 61 (12) **Actual service on defendant—effect.** The plaintiff may, at any time before judgment, have a summons served on the defendant if found in this State, although a warning order may have been previously entered against him; and after such service the case shall proceed as in other cases of actual service.

TITLE V.

COUNTY IN WHICH AN ACTION MUST OR MAY BE BROUGHT.

- § 62. Real property—concerning.
- § 63. Fine or forfeiture to recover—officer against.
- § 64. Wills—concerning.
- § 65. Decedent's estate, to settle.
- § 66. Distribution, partition, sale of decedent's estate.
- § 67. Ward against guardian.
- § 68. Sinking fund commissioners or board of education.
- § 69. Prisoner or inmate of asylum.
- § 70. Upon return of "no property found."
- § 71. Bank or insurance company.
- § 72. Corporations generally.
- § 73. Common carrier.
- § 74. Person or character—injury to.
- § 75. Person constructively summoned.

§ 69. (1) **Depositions—guardian ad litem.** Depositions taken upon notice to corresponding attorney can be read against infant defendant constructively summoned, although he had no guardian *ad litem*. C. & L. R. R. Co. v. Bowler, 9 Bush 468. It seems that this Code does not require a guardian *ad litem* for an infant non-resident. See secs. 36, 59, subsec. 5. The Code of 1854, sec. 55, provided that no judgment could be rendered against an infant until after defense for him by guardian.

(2) **Trial—when action stands for.** If warning order made more than sixty days before term commences, equity action does not stand for trial at that term, unless pleadings are made up ninety days [now sixty] before commencement of term, as provided by secs. 91, 137, 393 of Code (same as secs. 60, 102, 364 of this Code). These sections must be construed together. Harris v. Adams, 2 Duv. 141. Secs. 57, 60, so far as they regulate the time given for answer, do not apply to the Louisville chancery court. 78 Ky. 79.

- § 76. Alimony or divorce.
- § 77. Contractor for public works.
- § 78. Transitory actions.
- § 79. Against single defendant—judgment.
- § 80. Several defendants—judgment.
- § 81. Defendant can not be summoned—when.
- § 82. Removal of defendant after commencement of action.

§ 62. **Real property—concerning.** Actions must be brought in the county in which the subject of the action, or some part thereof, is situated—

1. For the recovery of real property, or of an estate or interest therein.
2. For the partition of real property except as is provided in section sixty-six.
3. For the sale of real property under title ten, chapter fourteen, or under a mortgage, lien, or other encumbrance or charge, except for debts of a decedent.
4. For an injury to real property. (*Definition of "real property," sec. 732.*)

§ 62. (1) **Attachment may be levied on land in any county.** Land may be levied on and sold under an attachment in other county than one in which action is pending in which attachment is obtained. *Nixon v. Jack*, 16 B. M. 174. See also *Webb v. Wright*, 2 Bush 126, and sec. 201.

(2) **Enforcement of contract** concerning land where it does not involve a sale of the land to satisfy a lien is transitory. *Henderson v. Perkins*, 94 Ky. 207.

(3) **Infant's land—jurisdiction to sell.** Circuit court of one county has no jurisdiction to sell land of infant in another county on petition of guardian of infant, although land descended to infant from his father, who died intestate in county where suit brought, and his administrator qualified in that county. *Montgomery v. Montgomery*, 2 Bush 49; unless the action comes under secs. 65 or 66. See those sections and notes thereto.

(4) **Injury to land.** Action for injury to land—as cutting trees—must be brought in county in which land is located. *Meehan v. Edwards*, 92 Ky. 574.

(5) **Insolvent estate.** In action to settle, court may order sale of land situated in

another county. *Fishback v. Green*, 87 Ky. 107; *Mechanics' Trust Co. v. Cobb*, 14 R. 444.

(6) **Land in two counties adjoining.** Action to recover may be brought in either county. *Harlan v. Howard*, 79 Ky. 373.

(7) **Land—to enforce lien on.** Circuit court of one county has no jurisdiction to enforce lien on land in another county. *Webb v. Wright*, 1 Bush 107; unless the proceeding *in rem* attaches as an incidental remedy, 2 Bush 126.

(8.) **Rescission of contract concerning land.** Action for is transitory and may be brought in county other than that in which land is situated. *Thompson v. Elmore*, 13 R. 602.

(9) **Sale of land held jointly.** Separate action may be brought for in county where land lies, although an action is pending in another county for the division of the land and allotment of dower. *Danforth v. Moss*, 90 Ky. 246.

(10) **Specific execution of contract** concerning land and to enforce lien thereon, action for must be brought in county where land is located, and in such action a personal judgment for the purchase money may be rendered although the

§ 63 [94] **Fine or forfeiture to recover — officer against.** Actions must be brought in the county where the cause of action, or some part thereof, arose—

1. For the recovery of a fine, penalty, or forfeiture, imposed by a statute; but if the offense for which the claim is made be committed on a water-course or road which is the boundary of two counties, the action may be brought in either of them.

2. Against a public officer for an act done by him in virtue or under color of his office, or for a neglect of official duty.

3. Upon the official bond of a public officer.

§ 64 [95] **Wills—concerning.** A proceeding to establish, or an action to set aside, a will must be brought in the county in which the will, if valid, ought, according to law, to be recorded. (*County will must be recorded in, Ky. Stat., sec. 4849.*)

§ 65 [96] **Decedent's estate to settle.** An action to settle the estate of a deceased person must be brought in the county in which his personal representative was qualified. (*Other provisions concerning, secs. 428 to 438.*)

only defendant is summoned in another county. *Collins v. Park*, 93 Ky. 6; *Henderson v. Perkins*, 14 R. 782.

(11) **Title—to quiet.** Party having legal title and possession of land may institute suit against party claiming it, to quiet his title, in county where land lies *Landrum v. Farmer*, 7 Bush 46.

(12) **Title—to perfect.** Action to perfect title to land is transitory, and comes under sec. 78. *Page v. McKee*, 3 Bush 135.

§ 63. (1) **Fine or forfeiture.** A civil action may be maintained to recover. *Com. v. Sherman*, 85 Ky. 686; *Com. v. Avery*, 14 Bush 625.

(2) **Sheriff—failing to return or collect execution.** Action on sheriff's bond for failing to return execution from another county, and failing to pay over money collected on execution, must be brought in county where sheriff qualified. *Bank of Ky. v. Harrison*, 1 Bush 384; *Foster v. Wade*, 4 Bush 628. And for failing to make execution from another county, must be brought in county where he qualified. *Groom v. Pickett*, 4 Bush 372.

§ 64. **Will—to set aside.** Petition seeking division of land will not confer jurisdiction to set aside will unless court had jurisdiction independent of suit for division. *Hughes v. Sidwell*, 18 B. M. 259. See 1 Bush 515; 17 B. M. 632; as to when will may be set aside see *Ky. Stat., sec. 4861*, and *Abbott v. Traylor*, 11 Bush 335.

§ 65. (1) **Action for sale of land and distribution** of proceeds as directed by will must be brought in county where will is probated. *Flint v. Spurr*, 17 B. M. 499.

(2) **Settlement of estate—parties.** In action to settle decedent's estate only the persons named in sec. 428 are necessary parties, and debtors of the estate or persons liable to it are not proper or necessary parties, and the court by service of process in another county can not acquire jurisdiction over them. *Citizens' Bank v. Boswell*, 93 Ky. 92.

(3) **Settlement of estate—sale of land.** In action to settle estate land in county other than one in which action is pending may be sold. *Fishback v. Green*, 87 Ky. 107.

§ 66 (97) Distribution, partition, sale of decedent's estate. An action for the distribution of the estate of a deceased person, or for its partition among his heirs, or for the sale, for payment of his debts, of property descended from or devised by him, must be brought in the county in which his personal representative was qualified. (*Other provisions concerning, secs. 428 to 438.*)

§ 67 (98) Ward against guardian. An action by a ward against his guardian for a settlement of his accounts, for additional security, or for his removal, must be brought in the county in which the guardian was qualified.

§ 68 (99) Sinking fund commissioners or board of education. An action against the Commissioners of the Sinking Fund, or the Board of Education, of this State, must be brought in the county that includes the Seat of Government.

§ 66. (1) Jurisdiction. In an action for the sale of a decedent's estate for the purpose of reinvestment as to the infants and a division of the proceeds as to the adults, the court of the county in which the decedent died had jurisdiction to order the sale of real property in other counties. *Phalan v. L. S. V. & T. Co.* 88 Ky. 24.

(2) Action against administrator and heirs to subject land descended to the payment of decedent's debts must be brought in county where administrator qualified, and so must an action by ward against administrator of his guardian and his heirs to subject land descended. *Willis v. Roberts*, 90 Ky. 122.

(3) Action by administrator and heirs for sale of land and division of proceeds must be brought in county where representative qualified and land located in another county may be sold. *Walker v. Yowell*, 14 R. 829.

(4) **Parties to action.** In action under this section the only necessary parties are those mentioned in sec. 428; debtors of the estate or persons liable to it are not necessary or proper parties. *Citizens' Bank v. Boswell*, 93 Ky. 92.

(5) **Partition of land.** Suit should be brought in county where administration was granted for partition of lands of an

intestate; but it not appearing that administration was granted, suit was properly brought in county where he died. *Driskell v. Hanks*, 18 B. M. 855.

(6) **Set-off by distributee against administrator.** Distributee of estate sued by administrator for debt due latter in his own right can not plead asset-off amount due him by administrator on the settlement of the estate, in a county other than that in which he qualified. This section applies to set-off. *Bennett v. McCrocklin*, 3 Met. 322.

§ 67. (1) Jurisdiction. Trustee of an express trust who desires to settle his accounts must bring action to do so in county where instrument creating trust is recorded. *Cunningham v. Frazie*, 85 Ky. 35.

(2) Action by administrator of ward against guardian must be brought in county where guardian qualified. *Stone v. Powell*, 13 B. M. 342.

(3) Action by ward against guardian for balance due on settlement must be brought in county where guardian qualified. *Greenly v. Daniels*, 6 Bush 41.

(4) Action by ward against administrator and heirs of his guardian to subject land descended to them must be brought in county where administrator qualified. *Willis v. Roberts*, 90 Ky. 122.

§ 69 ^[100] **Prisoner or inmate of asylum.** An action, not mentioned in sections sixty-two to sixty-seven, both inclusive, nor in section seventy, against a prisoner in this State, or a person confined in an asylum for persons of unsound mind in this State, must be brought in the county, if known, in which he resided, or claimed his residence, when confined. (*Service of summons on, secs. 53-54.*)

§ 70 ^[174] **Upon return of "no property found."** An action upon a return of no property found, pursuant to section four hundred and thirty-nine, must be brought in the county in which the judgment is rendered, or in which the defendant resides or is summoned.

§ 71 ^[101] **Bank or insurance company.** Excepting the actions mentioned in sections sixty-two to sixty-six, both inclusive, and in sections seventy and seventy-five, an action against an incorporated bank or insurance company may be brought in the county in which its principal office or place of business is situated; or, if it arise out of a transaction with an agent of such corporation, it may be brought in the county in which such transaction took place. (*Service of summons on, sec. 51.*)

§ 69. **Prisoner—act of 1856.** Action under act of 1856 to have conveyance made by prisoner operate as assignment for benefit of his creditors may be brought in the county where the person to whom property is transferred is summoned, and where part of the property is situated. The action is transitory, and, although prisoner is necessary party, need not be brought in county of his residence at time of confinement. *McAlister v. Savings Bank*, 80 Ky. 684.

§ 70. (1) **Change made by this Code.** The words "county in which the judgment is rendered" are used in this Code in place of the words "in the court from which the execution issued," found in Code of 1854.

(2) It was held under Code of 1854 that if action was brought in county where judgment was rendered, it must be in court from which the execution issued; but, if brought in any other county, might be in any court having jurisdiction. *Smith v. Bohon*, 12 Bush 448; *Bohon v. Smith*, 11 Bush 32; 16 B. M. 174; 10 Bush 251; 11 Bush 636.

(3) **Jurisdiction.** Action against railroad company, if not brought in court whence execution issued, must be in

county where its president or chief officer resides, or its principal office or place of business is. *McDormant v. L., C. & L. R. R. Co.*, 11 Bush 386.

(4) Action upon return of no property may be brought in county in which defendant resides. *Parsons v. Spencer*, 83 Ky. 305. See further notes to sec. 439.

(5) Action may be brought in circuit court to subject *personally* upon a return of no property on an execution from a justice's court. *Austin v. Payne*, 7 Bush 480. But not land. *Weatherford v. Myers*, 2 Duv. 91; 7 Bush 480. See notes to sec. 439.

§ 71. (1) **Insurance company.** Under this section it was held that an action against an insurance company might be brought in Bourbon county, although its charter granted in 1839 required all suits against it to be filed in Jefferson County Circuit Court. *Howard v. K. & L. Ins. Co.*, 13 B. M. 281.

(2) Action against may be brought in county in which the contract of insurance with agent was made, and process may be served upon chief officer in another county. *Ky. Mut. Ins. Co. v. Logan*, 90 Ky. 364.

§ 72 ^[101, 102] **Corporations generally.** Excepting the actions mentioned in sections sixty-two to sixty-six, both inclusive, and in sections sixty-eight, seventy, seventy-one, seventy-three, seventy-five, and seventy-seven, an action against a corporation which has an office or place of business in this State, or a chief officer or agent residing in this State, must be brought in the county in which such office or place of business is situated or in which such officer or agent resides; or, if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or, if it be for a tort, in the first-named county, or the county in which the tort is committed. (*Who is "chief officer," sec. 732. Meaning of "resides," sec. 732. Service of summons on, sec. 51.*)

§ 73 ^[102] **Common carrier.** Excepting the actions mentioned in section seventy-five, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the contract is made; or in which the carrier agrees to deliver the property. An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides if he resided in a county into which the carrier passes. (*Service of summons on, sec. 51.*)

§ 72. **Construction of section.** This section was not intended to and does not apply to actions against common carriers. *Harper v. N. N. & M. V. Co.*, 90 Ky. 359; *Sherrill v. C. & O. R. R.*, 89 Ky. 302; and see *C. & O. S. R. R. Co. v. Heath*, 87 Ky. 651.

§ 73. (1) **Common carrier—jurisdiction.** Action against common carrier, whether it be a corporation or partnership, may be brought in county where contract is made. *Adams Ex. Co. v. Crenshaw*, 78 Ky. 136.

(2) Where a contract was made in M. county with a railroad to transport stock to a certain point, thence to be carried by another company to destination, suit against latter company for damages may be brought in M. county where contract was made and summons may be executed in another county. *N., C. & St. L. R. R. Co. v. Carrico*, 95 Ky. 489.

(3) Action against a carrier for a per-

sonal injury can not be brought in a county which is neither the residence of any of the parties nor the place where the injury was done. *Sherrill v. C., O. & S. R. Co.*, 89 Ky. 302; and in case of a railroad company the residence of its president if there be one in the State, or if not its vice-president must be treated as the residence of the company in determining question of jurisdiction. *Harper v. N. N. & M. V. R. R. Co.*, 90 Ky. 359. But see *C. & O. R. R. v. Cowherd*, 16 R. 373, where it is held this section only applies when the defendant resides in this State or when plaintiff is injured therein or resides in a county in this State through which the carrier passes, and a resident of this State who is injured in another State by a company doing business in this State may sue in the county where the company has a general ticket agent and serve process upon him.

§ 74. **Person or character — injury to.** Every other action for an injury to the person of the plaintiff, and every action for an injury to the character of the plaintiff, against a defendant residing in this State, must be brought in the county in which the defendant resides, or in which the injury is done. (*See also sec. 123-124.*)

§ 75 ⁽¹⁰⁸⁾ **Persons constructively summoned.** Excepting the actions mentioned in sections sixty-two to sixty-seven, both inclusive, and in section seventy and section seventy-six, an action against a defendant who may be proceeded against by a warning order, as is authorized by section fifty-seven, must be brought in a county in which the defendant resides at the commencement of the action; or in which he has property; or in which a person resides against whom he has a valid claim for money or property.

§ 76. **Alimony or divorce.** An action for alimony or divorce must be brought in the county where the wife usually resides, if she have an actual residence in this State; if not, in the county of the husband's residence. (*See also secs. 420 to 427, and as to venue of action see Ky. Stat., sec. 2120, same as this.*)

§ 77. **Contractor for public work.** Excepting the actions mentioned in section seventy-five, an action against a contractor who undertakes to construct, in whole or in part, any turnpike, bridge, railway, lock,

(4) Where a railroad is owned by one company and controlled and operated by another the latter company is liable for an injury done by its employes. 90 Ky. 359.

§ 74. (1) **Assault and battery.** Action may be brought in this State for an assault and battery committed in another State. *Watts v. Thomas*, 2 Bibb 458.

(2) **False imprisonment.** Where warrant for arrest is sworn out in one county, and defendant is arrested in another, action for false imprisonment lies in county where he is arrested. *Mitchell v. Ripy*, 82 Ky. 516.

§ 75. **Non-residents.** If all the defendants are non-residents, action should be brought in county in which one of them has property; but if some of defendants are residents of this State, it should be brought in county where one of them resides or is summoned. *Nixon v. Jack*, 16 B. M. 174.

§ 76. (1) **Jurisdiction—waiver of objection.** By this statute (section) the Legislature only intended to fix the jurisdic-

tion when it was disputed, or when defendant was proceeded against by constructive service; but if defendant is summoned and appears and fails to object to jurisdiction, the court may grant the divorce, if it has jurisdiction to grant one in any case. *Johnson v. Johnson*, 12 Bush 485, and see *Ky. Stat.*, sec. 2120.

(2) **Residence—averment of.** The allegation in petition that plaintiff "now resides and for some while has resided in Garrard county" is *prima facie* equivalent to the expression "usually resides" contained in this section. *Lochnane v. Lochnane*, 78 Ky. 467. And allegation that plaintiff is resident of Campbell county, omitting the word "Kentucky," is sufficient. *Strode v. Strode*, 3 Bush 227.

(3) **Residence—what constitutes.** See *Perzel v. Perzel*, 91 Ky. 634; *Rhym v. Rhym*, 7 Bush 316; legal residence distinguished from actual residence. *Tipton v. Tipton*, 87 Ky. 243.

dam, or other public work, for labor done, or materials or supplies furnished, for the construction or promotion of said work, may be brought in the county wherein the labor, or most of it, is done, or wherein the materials, or supplies, or most thereof, are furnished; and if such bridge connect two counties, such action may be brought in either of them.

§ 78 [106] **Transitory actions.** An action which is not required by the foregoing sections of this article to be brought in some other county may be brought in any county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned. (*See sec. 82, and for exceptions to rule see secs. 81, 542.*)

§ 79 [107] **Against single defendant—judgment.** In an action brought pursuant to section seventy-eight, against a single defendant, there shall be no judgment against him, unless he be summoned in the

§ 78. (1) **Answer by one—effect on others.** The answer of one of several defendants not residing in county where suit is brought does not confer jurisdiction as to other defendants who are summoned out of the county. *Kennedy v. Davenport*, 13 B. M. 167.

(2) **Consent to jurisdiction.** When court has no jurisdiction of subject matter consent can not give. *Barton v. Barton*, 80 Ky. 212; but consent does, when court has jurisdiction of subject matter. *Hughes v. Hardesty*, 13 Bush 364.

(3) **One must be summoned in county.** In suit against several defendants, it should appear that one of them was served with process in the county where suit was brought, before judgment rendered against any of them. *Pottinger v. Mayfield*, 14 B. M. 647.

(4) **Personal judgment may be rendered in an action to enforce lien on land brought in county where land is situated against the defendant who is summoned in another county.** *Collins v. Park*. 93 Ky. 6.

(5) **Procured by fraud.** Service upon defendant brought within jurisdiction of court by fraud of plaintiff does not confer jurisdiction to render judgment. *Wood v. Wood*, 78 Ky. 624; and defendant may show want of jurisdiction without entering appearance. 88 Ky. 529.

(6) **Service on party improperly joined.** A defendant improperly joined, and summoned, will not give jurisdiction as to defendants residing in and summoned in another county. *Bayse v. Brown*, 78 Ky. 553; *Ransdall v. Shropshire*, 4 Met. 327.

(7) **Transitory actions.** To perfect title to land. *Page v. McKee*, 3 Bush 135; to to rescind contract concerning land. *Thompson v. Elmore*, 13 R. 692; to compel one who holds legal title to land to execute conveyance. *McQuerry v. Gilliland*, 89 Ky. 434; *Henderson v. Perkins*, 94 Ky. 207.

(8) **Waiver of objection to jurisdiction.** Filing answer is. *Baker v. L. & N. R. Co.*, 4 Bush 610; 14 Bush 289; or general demurrer to petition. *McDowell v. C., O. & S. W. R. R.*, 90 Ky. 346; 93 Ky. 177; but motion to quash summons is not. *Barbour v. Newkirk*, 83 Ky. 529; nor is filing answer objecting to jurisdiction. *C., O. & S. W. R. R. v. Heath*, 87 Ky. 651; *Lillard v. Brannin*, 91 Ky. 511.

§ 79. (1) **Evidence as to residence.** Defendant sued in one county and served with process in another; evidence that he lived in former county when suit brought and judgment rendered did not authorize judgment; but if he removed from former county after suit filed, judgment would have been proper on evidence of that fact. *Dyas v. Lindsey*, 5 Bush 506.

county wherein the action is brought; or, unless he reside in such county when the action is brought and be summoned elsewhere in this State; or, unless he make defense to the action before objecting to the jurisdiction of the court.

§ 80 [100, 101] **Several defendants—judgment, bankrupt.** In an action brought pursuant to section seventy-eight, against several defendants, no judgment shall be rendered against any of them, upon the service of a summons out of the county in which the action is brought, if no one of them be summoned in that county, nor resided therein when the action was commenced; nor if the action be discontinued or dismissed as to the defendant who resided, or was summoned, in that county; nor if judgment be rendered in his favor, unless a defendant summoned out of that county make defense without objecting to the jurisdiction of the court: *Provided*, That a judgment for a defendant, who resided or was summoned in that county, upon a plea of his discharge as a bankrupt, shall not prevent a judgment against any other defendant, in an action brought before the commencement of the proceedings in which the discharge was obtained; but, after such judgment upon a plea of discharge in bankruptcy, a defendant not summoned in the county, nor residing therein at the commencement of the action, may, by answer, deny the liability of such bankrupt. The issue as to the original liability of such bankrupt shall be tried as if he were still a party, and the plaintiff shall not have judgment against the defendant not summoned nor residing in the county, unless it be decided that the bankrupt was originally liable. (*See further as to judgment, secs. 370, 373.*)

(2) **Personal judgment** in action to enforce lien on land. *Collins v. Park*, 93 Ky. 6.

(3) **Service in another county.** Suit was brought in county of defendant's residence and process issued to that and another county, and was served in latter, but not in former, in time for judgment. It was error to render judgment on service in another county. *Raymon v. Reed*, 16 B. M. 345.

(4) **Defendant need not respond.** to summons in such case. *Dyas v. Lindsey*, 4 Bush 349; *Ruby v. Grace*, 2 Duv. 540.

§ 80. (1) **Dismissal as to defendant served in county.** If several defendants are sued and one is served with process in another county, judgment can not be rendered against him if action is dismissed as to

or judgment is not rendered against one served in county where suit brought. *Duckworth v. Lee*, 10 Bush 51; *Reid v. Cain*, 3 R. 329; *Ward v. George*, 1 Bush 357; see notes to secs. 78 and 79.

(2) **Judgment by default on defective petition—effect.** Judgment by default against one of several defendants served in county where suit brought, when petition does not state cause of action against him, and it is not made out by proof, will not authorize judgment against a defendant served in another county and who pleads to jurisdiction. *Meguiar v. Rudy*, 7 Bush 432; *Fernold v. Speer*, 3 Met. 450.

(3) **Waiver of objection.** Where the action is dismissed as to only defendant summoned in the county by consent with

§ 81. **Defendant can not be summoned—when.** In an action brought pursuant to section seventy-eight, a defendant who is summoned out of the county in which it is brought, and who did not reside therein when the action was begun, can not be summoned in that or any other action of the plaintiff whilst visiting such county for the sole purpose of defending the first-named action. (*And see further, sec. 542.*)

§ 82 [110] **Removal of defendant after commencement of action.** If, after the commencement of an action in the county of the defendant's residence, he move therefrom, the service of a summons upon him in any other county shall have the same effect as if it had been made in the county from which he moved.

TITLE VI.

JOINDER OF ACTIONS.

§ 83. Causes of action that may be joined.

§ 84. Party may strike from pleading cause of action.

§ 85. Court may require party to elect—may strike out.

§ 86. Waiver of objection to misjoinder.

§ 83 [111] **Causes of action that may be joined.** Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought—

leave to other defendants to file an answer they are regarded as having waived their right to object to jurisdiction. *Meehan v. Edwards*, 92 Ky. 574.

§ 82. **Evidence as to residence at commencement of action.** *Dyas v. Lindsey*, 5 Bush 506.

§ 83. (1) **Assignee**—Action by to recover possession of personal property can not be united with an action by him to settle and distribute the estate. *Atchinson v. Jones*, 8 R. 259.

(2) **Causes must exist at commencement of action.** The joinder of actions referred to in this section (111, same as this sec.) applies to causes of action existing at time of suit and not such as arise subsequently; in action for slander plaintiff can not recover for slanderous words

spoken during the action and set up in an amended petition. *Taylor v. Moran*, 4 Met. 127.

(3) **Common interest.** When it is of common interest to several parties to set aside a judgment, which being done all questions will relate to the same parties and subject matter, there is no misjoinder. *McCormick v. McCormick*, 9 R. 519.

(4) **Contract—fraud.** Action upon contract and for fraud can not be joined, *Wilson v. Thompson*, 1 Met. 123, unless the cause of action for fraud or negligence is directly connected with the cause of action upon the contract. *Jones v. Johnson*, 10 Bush 649; *Gregg v. Woods*, 3 R. 526; *Jones v. Johnson*, 86 Ky. 530.

1. Upon contracts, express or implied; or,
2. For the recovery of real property and the rents, profits and damages for withholding it; or,
3. For the recovery of specific personal property, and damages for the taking or withholding it; or,

(5) **Creditor against guardian and wards.** Guardian of several wards can not be sued in same action for claims due by each of his wards distinct from the others. *St. Joseph O. S. v. Wolpert*, 80 Ky. 86.

(6) **Debtor and persons who won from him gaming.** See *Caldwell v. Caldwell*, 2 Bush 446.

(7) **Distributees against administrator.** Distributees can not sue jointly an administrator for balance due by him on settlement. *Pelly v. Bowyer*, 7 Bush 513; *Jackson v. Robinett*, 2 Bibb 292.

(8) **Joint owners against trespassers.** Joint owners of land may maintain joint action for its recovery against several persons claiming and holding separate parcels of it. *Woolfolk v. Ashby*, 2 Met. 288. See to the contrary, *Sale v. Crutchfield*, 8 Bush 636.

(9) **Jurisdiction**—misjoinder can not give as to defendant summoned out of county. See note 2 to sec. 86.

(10) **Land—damages—separate actions.** In action to recover land and damages for its detention, the judgment for the land and damages for its detention are as distinct as if separate judgments were rendered in different suits, and in such action the judgment for recovery of land may be affirmed and for damages reversed. *Shean v. Cunningham*, 6 Bush 123.

(11) **Land—rents—trespass.** Plaintiff may in one action sue for land and rents, and in another to recover damages for trespasses and injuries committed by destruction of timber and other property on the land; *Burr v. Woodrow*, 1 Bush 602, 18 B. M. 541. But may if he choose sue for land in one action and in another for rents; if he unites both in same action he can not in separate action sue for rents, but may in separate action recover for extraordinary expense such as

was not and could not have been set up in action for land and rent. *Walker v. Mitchell*, 18 B. M. 541.

(12) **Libel and slander.** Causes of action for may be united. *Hargan v. Purdy*, 93 Ky. 424.

(13) **Lienholders.** Two or more may unite in same action for the purpose of enforcing their respective liens. *Boyd v. Jones*, 8 R. 602.

(14) **Officials—in public and private capacity.** An action can not be maintained against officers of a municipal corporation in both their official and private capacity for the same injury. *Hancock v. Johnson*, 1 Met. 242.

(15) **Order of delivery—enforcement of mortgage.** Petition seeking to recover a debt, and to enforce mortgage lien to secure its payment, and to obtain order of delivery for possession of mortgaged property, which had been subsequently mortgaged to another, is a misjoinder of actions. *McKee v. Pope*, 18 B. M. 548.

(16) **Remote obligor in bond.** The owner of a slave hired her for a year to A and B, and they hired her to C, taking from C a covenant to A with D as surety for the return of the slave. C caused her death, and ran off. The owner and A and B could maintain an action on the covenant against D. *Carney v. Walden*, 16 B. M. 388.

(17) **Slander—false imprisonment.** Action for false imprisonment or malicious arrest and slander can not be joined. *Dragoo v. Levi*, 2 Duv. 520.

(18) **Splitting causes of action** so as to bring two suits in place of one will not be allowed, and if it is done the court should require the actions consolidated. *Powell v. Weiler*, 11 B. M. 187; and see *Pilcher v. Ligon*, 91 Ky. 228; *Weinstock v. Bellwood*, 12 Bush 139.

(19) **Trespassers.** Joint or several judgments against; see Ky. Stat., sec. 12:

4. For partition of real or personal property, or both; or,
5. For injuries to character; or,
6. For injuries to person and property. (*And see as to actions for trespass, Ky. Stat., sec. 12.*)

§ 84 ^[113] **Party may strike from pleading cause of action.** A party may strike from his petition, answer or reply any cause of action, before the final submission of the case to the jury, or the court, if the trial be by the court. (*May dismiss without prejudice, sec. 371.*)

§ 85 ^[113] **Court may require party to elect—may strike out.** The court, at any time before defense shall, on motion of a party, require the adverse party to elect which of two or more causes of action, improperly joined, he will prosecute; and, upon his refusal so to elect, shall strike out of the petition, answer or reply any cause of action improperly joined with another. (*See further, sec. 113.*)

§ 86 ^[114] **Waiver of objection to misjoinder.** Objections to the misjoinder of causes of action are waived, unless they are made pursuant to section eighty-five.

Alexander v. Humber, 86 Ky. 565; Cent. Pass. Ry. Co. v. Kuhn, 86 Ky. 578.

(20) **Vendees—to set aside fraudulent deed to.** In an action by an assignee in bankruptcy to set aside as fraudulent several conveyances made by the bankrupt, the several fraudulent vendees may be joined as defendants. Anderson v. Anderson, 80 Ky. 638.

(21) **Warranty—fraudulent concealment.** Causes of action for growing out of same transaction may be united. Gregg v. Woods, 3 R. 526.

§ 84. **Amended petition making misjoinder.** In an action on contract plaintiff filed an amended petition setting up and relying on fraud in obtaining contract. Held, that plaintiff might in an amended petition set up action that could not be joined with action in petition, and thus abandon his original action and rely on that in amendment. Hord v. Chandler, 13 B. M. 403. But see sec. 113-4, and note 1 to sec. 85.

§ 85. (1) **Amendment—objection to for misjoinder.** If an amended petition would make a misjoinder of actions by setting up a new cause, objection can be made to its filing. Hancock v. Johnson, 1 Met. 242.

(2) **Misjoinder—how objected to.** Motion to dismiss petition because there is misjoinder is not proper. Objection to misjoinder should be made by motion to elect. Hunt v. Semonin, 79 Ky. 270; Humphrey v. Hughes, 79 Ky. 487.

(3) **Motion to elect—duty of court.** If causes of action be misjoined, plaintiff may on motion be required to elect, and, on failure, court should strike out one of the causes misjoined; if plaintiff then refuse to proceed, the petition should be dismissed. Dragoo v. Levi, 2 Duv. 520.

(4) Where the plaintiff refuses to elect, the court should not dismiss the action, but strike out the cause improperly joined. Sheppard v. Stephens, 8 R. 603.

(5) **One cause—but irrelevant matter.** No election can be required if petition state but one substantial cause of action, although it may contain irrelevant and redundant matter. Bonney v. Reardin, 6 Bush 34.

§ 86. (1) **Misjoinder—waiver.** Objection for misjoinder must be made in circuit court. McKee v. Pope, 18 B. M. 548; and failure to make motion at proper time operates as a waiver of objection. Wilson v. Thompson, 1 Met. 123; Caldwell v. Caldwell, 2 Bush 446; 8 Bush 636; 79

TITLE VII.

PLEADINGS IN CIVIL ACTIONS.

- CHAPTER I. PLEADINGS IN GENERAL, 87.
 II. PETITION, 90.
 III. DEMURRER, 91.
 IV. ANSWER—COUNTER-CLAIM—SET-OFF—CROSS-PETITION, 95.
 V. REPLY AND ADDITIONAL PLEADINGS, 98.
 VI. TIME OF PLEADING, 102.
 VII. GENERAL RULES OF PLEADING, 110.
 VIII. MISTAKES IN PLEADING AND AMENDMENTS, 129.
 IX. INTERROGATORIES, 140.

CHAPTER I.

PLEADINGS IN GENERAL.

- § 87. Pleadings defined.
 § 88. Form and sufficiency of.
 § 89. Pleadings allowed.

§ 87 [115] **Pleadings defined.** Pleadings are statements by parties to an action of their causes of controversy. (*Caption of, sec. 110; what may contain, sec. 113-2; verification of, and by whom, secs. 116, 117; issue must be formed, sec. 114; when allegations confessed, 126; when must be proved, 126; what writings must, or may, be filed, 120, 128.*)

Ky. 270; and waiver by filing answer remains although answer be withdrawn; *Chiles v. Drake*, 2 Met. 146.

(2) **Misjoinder can not give jurisdiction.** Although misjoinder is waived by not objecting in time, yet such misjoinder can not give court jurisdiction over defendant summoned in another county, when otherwise court would not have jurisdiction. *Ransdall v. Shropshire*, 4 Met. 326; see *Maddox v. Williams*, 5 R. 695; *Basye v. Brown*, 78 Ky. 553.

§ 87. (1) **Allegation and proof.** It is as necessary to state a cause of action as it is to sustain it by proof. The absence of either prevents a recovery, *Murrell v. McAlister*, 79 Ky. 311, and the plaintiff can only recover upon proof of the cause of action alleged in his petition. *Gosom v. Badgett*, 6 Bush 97; 1 Met. 339. As to variance between pleading and

proof, see secs. 129, 130, 131, and notes thereto.

(2) An allegation neither proved nor admitted or a ground of defense not alleged in the pleadings, although proven, is to be treated as if such allegation or defense did not exist. *Wilkins v. Barnes*, 79 Ky. 323.

(3) Proof that a party introduces must not contradict what he alleges in his pleadings to be true, he will not be permitted to recover on a state of facts he says is not true; he must amend his pleadings. *Payne v. Hardesty*, 12 R. 336.

(4) **Construction of pleadings.** Before verdict, pleadings will be construed against the pleader; after verdict, pleadings will be liberally construed to uphold the verdict, and a pleading insufficient before verdict may be good after verdict.

§ 88 ^[116] **Form and sufficiency of.** The forms of pleadings, and the rules by which their sufficiency is to be determined, are those prescribed by this Code. (*See as to rules of pleading, sec. 110.*)

§ 89 ^[117] **Pleadings allowed.** The pleadings allowed are—

1. Petitions, answers and replies, and such additional pleadings, by way of rejoinder and rebutter, as may be necessary to form a material issue of fact.
2. Demurrers.

CHAPTER II.

PETITION.

§ 90. **Requisites of—prayer for relief.**

§ 90 ^[118] **Requisites of—prayer for relief.** The petition must state facts

Worthy v. Hammond, 13 Bush 510. See Skillman v. Muir, 4 Met. 282; 16 B. M. 643; 10 Bush 185.

(5) **Evidence — not to be stated.** It is not sufficient to state the evidence relied on, nor necessary to set forth evidence of the truth of the facts relied on. L. & P. Canal Co. v. Murphy, 9 Bush 522; Bentley v. Bustard, 16 B. M. 643; 2 Met. 490.

(6) **Facts — how to be averred.** The facts relied upon should be directly and positively alleged, and not stated by way of argument, inference or belief. Patterson v. Caldwell, 1 Met. 489; Garnett v. Finnell, 2 Duv. 166; Walters v. Chinn, 1 Met. 499; 3 Met. 61. The failure to state a material fact can not be obviated by the statement of another fact that raises a *prima facie* presumption of its existence. Meguiar v. Henry, 84 Ky. 2; 1 Duv. 59; 11 Bush 693.

(7) **Verdict.** Defects in pleadings that are cured by. See note 10, sec. 95.

§ 88. **Forms but not substance abolished** by Code; and every essential averment required to make a declaration good at common law must be made in the petition. L. & P. Canal Co. v. Murphy, 9 Bush 522; and see note to sec. 4.

§ 89. **Pleadings allowed.** The only pleadings allowed by Code of 1854, were the petition, demurrer, answer, reply, set-off and counter-claim, and by act of 1857, a cross-petition was allowed. Myers' Code, sec 117.

§ 90. (1) **Account.** Averment that account is just, due and unpaid is sufficient. The debt could not be just if the goods were not reasonably worth price charged, and a promise is implied to pay reasonable value from the sale and delivery of the goods at defendant's request. Wood v. Wells, 2 Bush 197; Thruston v. Oldham, 6 Bush 16. Averment of sale and delivery to defendant of goods worth a certain sum, or the rendition of services worth a certain sum, is sufficient to authorize judgment by default; a promise to pay is implied. Skillman v. Muir, 4 Met. 282.

(2) A petition alleging in substance that the defendant is indebted to plaintiff in the sum of \$1,963 for goods bought, the whole of which is due and unpaid, is not good. There should be an averment that the goods were sold and delivered to defendant, or that they were sold upon the promise of defendant to pay. Drake v. Semonin, 82 Ky. 291.

which constitute a cause of action in favor of the plaintiff against the defendant, and must demand the specific relief to which the plaintiff

(3) **Administrator—against.** It is not necessary to allege that the debt sued for was demanded of administrator, accompanied by proper affidavit, before action commenced. If demand has not been made, it can be reached by rule. *Rogers v. Mitchell*, 1 Met. 22; *Thomas v. Thomas*, 15 B. M. 178.

(4) **Assault and battery.** How averments asking special damages should be set out. *Jesse v. Shuck*, 11 R. 463. Petition for must set out facts constituting the assault. *Stivers v. Baker*, 87 Ky. 508.

(5) **Assignee against assignor.** In action by assignee against assignor of a note it is necessary to aver the consideration paid for the assignment. *Humphrey v. Hughes*, 79 Ky. 487; Ky. Stat., sec. 475. And before he can recover he must institute his action against the payor at the first term of the court and prosecute him to insolvency without unreasonable delay. *Francis v. Gant*, 80 Ky. 190.

(6) **Attorney—against.** In action against attorney for money collected, demand must be made before suit filed. *Roberts v. Armstrong*, 1 Bush 263.

(7) **Award—to set aside.** To set aside an award on the ground of fraud, the specific acts of fraud relied on must be averred. *Phillips v. Phillips*, 81 Ky. 147.

(8) **Blanks in petition.** Plaintiff, in order to recover specified amounts, should state the amounts, and not leave blank places for them in his pleading. *Jesse v. Shuck*, 11 R. 463.

(9) **Bond.** In action on bond, the petition should set out the covenants of the bond, and the breach of them relied on. *Mann v. Martin*, 82 Ky. 242.

(10) In action on indemnifying bond, the terms and stipulations of the bond must be set out, as well as the breach of it; filing bond with petition, or referring to it, is not sufficient. *Riggs v. Maltby*, 2 Met. 88; *Campbell v. Galbreath*, 12 Bush 459; 14 B. M. 252.

(11) Petition on injunction bond conditioned to pay judgment enjoined, if injunction dissolved, is insufficient unless

it states that the judgment is unpaid. *Crawford v. Woodworth*, 9 Bush 745.

(12) **Constable—against.** In action against constable for money collected, it is necessary to allege a demand and refusal to pay. *Harris v. Perry*, 2 Bush 101; *Huston v. Hagar*, 1 Duv. 24.

(13) **Contract—for breach of.** The breach of a contract is an essential part of the cause of action, and should be assigned in the words of the contract, or in words which are co-extensive with the import and effect of it. The rules of pleading which require that the contract shall be substantially set out, as well as the breach of which plaintiff complains, are fundamental, and have not been changed by the Code. *Moxley v. Moxley*, 2 Met. 309; 8 B. M. 377. In an action for damages for breach of contract, where the agreements are mutual and dependent, and each is to perform his part at the same time, the petition must aver that plaintiff was ready to perform his part of the agreement at the time and place required. *Sousley v. Burns*, 10 Bush 87; 13 B. M. 464. But the averment of readiness to perform is only necessary where the acts to be done are concurrent, and is not required where the defendant is to pay money or perform some act before plaintiff is bound to do anything. *H. & N. R. R. v. Leavell*, 16 B. M. 358. It is necessary to state the contract, the breach and the facts which show the loss or damage by reason of the breach. *Miles v. Miller*, 12 Bush 134; and see *Lewis v. Scott*, 95 Ky. 484, for necessary allegations in petition by servant against master to recover damages for wrongful discharge.

(14) **Creditor against assignee.** A creditor can not maintain an ordinary action against an assignee to whom his debtor has made an assignment, and recover judgment for his debt. *Dobyns v. Dobyns*, 79 Ky. 95.

(15) **Defects cured by answer—verdict.** See note 10 to sec. 95.

(16) **Defense need not be anticipated.** It is not necessary to notice and remove

iff considers himself entitled; and may contain a general prayer for any other relief to which the plaintiff may appear to be entitled. If

objections that may exist and can be relied on for defense. *L. & P. Canal Co. v. Murphy*, 9 Bush 522; *Shelbyville Trustees v. S. & E. T. P. Co.*, 1 Met. 54; *Bentley v. Bustard*, 16 B. M. 643.

(17) **Dower.** In action by widow against purchaser from her husband to have dower allotted, the petition did not aver that her husband was the owner of the land during coverture, nor that she was his wife when purchase was made by defendant, and was not good. *Yancy v. Smith*, 2 Met. 408; see *Fritz v. Tudor*, 2 Duv. 173.

(18) **Exhibits filed** which contradict averments of petition must control. *Ky. Mut. Ins. Co. v. Logan*, 90 Ky. 364; *Boyd v. Bethel*, 10 R. 470; but in determining the sufficiency of a pleading an exhibit neither aids nor destroys. *Green v. Page*, 80 Ky. 368.

(19) **Guaranty.** When notice of the acceptance of an offer of guaranty is requisite in action on guaranty, the allegation of notice in the petition should be special, to enable the court to determine whether or not it is sufficient. General averment "of all of which defendant had notice" is not sufficient. *Steadman v. Guthrie*, 4 Met. 147.

(20) **Guardian's settlement—to surcharge.** In action to surcharge settlement of guardian, the petition must specify the particular items objected to. *Tanner v. Skinner*, 11 Bush 120; *Fielder v. Harbison*, 93 Ky. 482.

(21) **Heir for debt of ancestor.** To make the heir responsible for debt of ancestor it must be alleged that he received assets from ancestor. *Massie v. Hiatt*, 82 Ky. 314; 10 Bush 234; *ib.* 441; 80 Ky. 152. As to proper averment that one is heir, see *Montgomery v. White*, 10 R. 905; 7 Bush 51; and 18 B. M. 72.

(22) **Husband—for debt of wife.** In action by husband to recover debt made by wife before marriage, it is not necessary to allege that the husband received property by the wife. *Beaumont v. Mil-*

ler, 1 Met. 68; *Fultz v. Fox*, 9 B. M. 499; *Medley v. Tandy*, 85 Ky. 566; and see *Ky. Stat.*, sec. 2130; 88 Ky. 108.

(23) **Indorsers of note.** In action upon a note executed to plaintiff by D, payable in bank and indorsed in blank by F, N and C before its delivery, whereby, as alleged, they "intended to be equally bound as obligors," it was not alleged that they indorsed the note as accommodation indorsers, or with the view of having it discounted in bank, or for the purpose of guaranteeing its payment. Petition held not good against indorsers. *Kellogg v. Dunn*, 2 Met. 215.

(24) The presumption is that a note in the hands of the maker of it, indorsed by the payee, has been paid, and one to whom the maker has discounted it can not recover against the indorser without averring that it was indorsed for maker's accommodation. *Callahan v. First Nat. Bank*, 78 Ky. 604.

(25) **Interest.** To recover interest accruing anterior to the institution of the action on an unliquidated account, it is necessary that plaintiff should ask for that character of relief. *Adams Express Co. v. Milton*, 11 Bush 49.

(26) Interest is allowable as a matter of law upon an account from the time when, by the contract, it is payable, or from the time it becomes a liquidated one. *Henderson Mfg. Co. v. Lowell M. S.*, 86 Ky. 668.

(27) **Judgments.** In action on foreign judgment, it is necessary to allege facts showing that the court rendering the judgment had jurisdiction of the subject matter and the person of the defendant. *Gebhard v. Garnier*, 12 Bush 321; *Wood v. Wood*, 78 Ky. 624; 10 Bush 160; 12 Bush 274. As to pleading judgment of court of this State, see sec. 122.

(28) **Law of another State,** when depended upon, must be pleaded as any other fact, so that the court may judge of the effect of the law. *Roots v. Merriwether*, 8 Bush 397; *Bidwell v. Robinson*, 79 Ky. 29.

no defense be made, the plaintiff can not have judgment for any relief not specifically demanded; but, if defense be made, he may have

(29) **Legal conclusion.** Averment that defendant *extorted and obtained* three hundred dollars from plaintiff without any consideration, and was therefore indebted to him in that amount, is merely a legal conclusion, and petition is not good. *Murphy v. Estes*, 6 Bush 532. See 1 Duv. 30; 4 Met. 327; 87 Ky. 508.

(30) **Legislature no power to prescribe form** of pleading that dispenses with allegations of essential facts, or cuts off substantial defenses. *City of Louisville v. Cochran*, 82 Ky. 15; *Meguiar v. Henry*, 84 Ky. 1.

(31) **Marriage contract.** Where no time and place are agreed upon for the consummation of the marriage, no action can be maintained by either party for failure to perform, unless plaintiff aver an offer to perform and a failure of the defendant to comply. *Fible v. Caplinger*, 13 B. M. 464; and see *Shakelford v. Hamilton*, 93 Ky. 80.

(32) **Misnomer of defendant.** A party who makes defense to an action can not afterward set up that he was sued by wrong name, and thereby defeat recovery by plea of limitation. *Heckman v. L. & N. R. R. Co.*, 85 Ky. 631, and see *L. & N. R. R. Co. v. Hall*, 12 Bush 131.

(33) **Money had and received.** Averment that defendant received \$400 for the use of plaintiff, and thereby became indebted to him, and had paid no part of it, is insufficient. The facts showing how it was received, such as created an indebtedness, must be alleged. *Faught v. Henry*, 13 Bush 471.

(34) **Negligence.** It is sufficient in action for personal injury to allege in general terms that the injury complained of was caused by the carelessness and negligence of the defendant. *Chiles v. Drake*, 2 Met. 146; *L. C. & L. R. R. Co. v. Case*, 9 Bush 728. It is not necessary to allege that there was no contributory negligence on the part of plaintiff. *L. & P. Canal Co. v. Murphy*, 9 Bush 522; *P. & M. R. R. Co. v. Hoebl*, 12 Bush 41; 80 Ky. 82; 10 Bush 263; 84 Ky. 330.

(35) **Petition to recover for injury arising from negligence or want of skill** should state such facts as would authorize an action in case at common law; and, if for an injury done with force, such facts as would authorize action in trespass. *Kountz v. Brown*, 16 B. M. 577.

(36) In an action under sec. 4, Ky. Stat., it is necessary to aver that killing was not done in self-defense. *Becker v. Crow*, 7 Bush 198; 13 Bush 636.

(37) **New promise.** Action on new promise to pay an account is sufficient when the petition sets out the sale and delivery of the goods itemized in the account, and the promise to pay the amount due within two years before suit. *Adams v. O'Rear*, 80 Ky. 129.

(38) **Note not assigned.** Plaintiff can not maintain an action on a note averring that it was executed to himself when the note was executed to another person, and not assigned to plaintiff, and no allegation as to how he obtained it. *Dodd v. King*, 1 Met. 430; *Haney v. Tempest*, 3 Met. 95; 1 Bush 70.

(39) **Note payable to two persons,** neither has a separate right of action upon it without an averment of assignment from his co-payee. *Quisenberry v. Artis*, 1 Duv. 30.

(40) **Nuisance.** Although nuisance be public in its nature, an individual may recover damages caused by reason of it, if he allege and prove special injury to himself. *Corley v. Lancaster*, 81 Ky. 171.

(41) **Obligor in name of obligee.** One of several joint and several obligors may pay off the note, and, by agreement with the obligee, reserve the right to sue the other obligors in the name of the obligee. *Smith v. Latimer*, 15 B. M. 75.

(42) **Parties—names of to be stated.** The full names of all the parties, plaintiff and defendant, and the fiducial or other character in which they sue, or are sued, should be stated in the body of the petition; and, if partners, the full name of all the members of the firm should be

judgment for other relief, under a prayer therefor. (*Forms of petitions in various actions, pages 596-616; may be amended, secs. 109, 132, 134; verification of, secs. 116, 137.*)

stated. Newman's Pleadings and Practice, pages 218, 287; Quinn v. N. N. & M. V. Co., 15 R. 74.

(43) **Partnership settlement—to correct.** After the settlement of a partnership, in an action by one of the partners attacking it for fraud or mistake, he must allege the specific act of fraud or the particular mistake relied on. A general averment of fraud and mistake is not sufficient. Loesser v. Loesser, 81 Ky. 139.

(44) **Petition—provisions concerning.** A pleading may contain as many causes of action, legal and equitable, as there may be grounds for on behalf of the pleader (sec. 113-2); but, if more than one, each one must be stated in a separate, numbered paragraph (sec. 113-3). The statements of the pleading must be consistent, and not inconsistent, with those of any other pleading previously filed by the same party, unless he allege in the alternative the existence of one or another fact, and state that one, but which one he does not know, is true (sec. 113-4). The pleading must be signed by the party or attorney (sec. 115), and need not state facts of which judicial notice is taken, or the evidence (sec. 119-1). Private statute, how pleaded (sec. 119-2), and judgment of court (sec. 122).

(45) Petition must contain in its own body and not merely by reference to another paper a statement of the facts constituting the cause of action. Corbin v. Oldham, 1 R. 327.

(46) The petition must state in ordinary and concise language the facts constituting the cause of action, and every fact necessary to enable the plaintiff to recover must be alleged, and every essential averment required to make a declaration good at common law must be stated. The facts must be so alleged as to enable the opposite party to know what is meant to be proved, and also that an issue may be formed in regard to the subject matter in dispute and to enable the court to pronounce the law upon the

facts as stated. L. & P. Canal Co. v. Murphy, 9 Bush 522; Stivers v. Baker, 87 Ky. 508; 14 B. M. 83; 7 Bush 532; 6 Bush 532.

(47) **Prayer of petition.** The petition stated the amount of claims sued on, and prayer was for judgment for the amount of *said claims*, with interest due on each. Held sufficient to entitle plaintiff to judgment for claims and interest. Harris v. Perry, 2 Bush 101; and see further as to prayer for relief, 80 Ky. 529; 80 Ky. 371.

(48) The body of petition and prayer must be consistent, and the prayer for general relief must be consistent with that specifically prayed for. Crow v. O. & N. R. R., 82 Ky. 134.

(49) A party is not entitled to relief that he does not ask for in his pleading. Radford v. Southern Mutual Insurance Co., 12 Bush 434; Howland v. Brown, 13 Bush 681; 11 Bush 49.

(50) In an action to enforce a mortgage lien the prayer was, "Wherefore plaintiff prays that the mortgage be foreclosed, and for all other proper relief," no defense being made it was error to render a personal judgment. Hansford v. Holdam, 14 Bush 210.

(51) Prayer of petition in action to enjoin collection of judgment "for all proper relief" did not authorize judgment against defendant for amounts plaintiff claimed to be entitled to. Walker v. Thomas, 88 Ky. 486; and see further as to relief that may be granted under prayer for "general relief," Lillard v. Brannin, 91 Ky. 511; 80 Ky. 529; 80 Ky. 371. Alternative relief, see 9 R. 166.

(52) **Precedent condition.** At common law the pleader was required not only to aver the performance of the condition precedent, but to state the time and manner of its performance. This rule was changed by sec. 149 of Code of 1854. Sec. 149 is omitted from this Code, and its omission restores the common law rule. Averbeck v. Hall, 14 Bush 506;

CHAPTER III.

DEMURRER.

- § 91. Special and general.
- § 92. Special defined—waiver—costs.
- § 98. General defined—costs.
- § 94. Amendment after demurrer—costs.

§ 91 [120, 121] **Special and general.** Demurrers are special or general. (*Form of, page 616.*)

Ormsby v. City of Lou., 79 Ky. 197. The petition must aver the performance of all conditions precedent in the contract when the liability of defendant depends on their performance. Without such averments, no cause of action exists. Frye v. L. & B. S. R. R. Co., 2 Met. 314; Escott v. White, 10 Bush 169.

(53) **Premissory note.** A petition founded on a note must so set out the promise, its terms and its breach as to enable the court to render a judgment by default without being compelled to resort to the note on file; a promise or agreement to pay must be averred or petition will not be good. Huffaker v. Nat. Bank of Monticello, 12 Bush 287; see Hibler v. Shipp, 78 Ky. 64. In Totten v. Cooke, 2 Met. 275, it is held that the failure to state date of note sued on and filed with petition does not make petition defective, if it state amount of note, time it is payable and aver that defendant is indebted in amount of note naming it, and see Burton v. White, 1 Bush 9. The accidental omission of the words "the defendants," the subject of the verb "agreed," is not a substantial defect. "The omission of those things which are silently expressed is of no consequence." Warfield v. Gardner, 79 Ky. 583; and see Hibler v. Shipp, 78 Ky. 64.

(54) The petition must state when note falls due, or so specify dates that the fact may be ascertained without going outside the pleading. Corbin v. Oldham, 1 R. 327.

(55) **Slander.** In action for slander, it is necessary to set forth the specific words complained of; it is not sufficient

to state the effect of the words. Taylor v. Moran, 4 Met. 126. And it is necessary to aver that the words were spoken maliciously. Williams v. Gordon, 11 Bush 603.

(56) **Splitting cause of action** not allowable, and where one has sued for part of an entire demand he will not be allowed to sue for remainder in another action. Pilcher v. Ligon, 91 Ky. 228; Weinstock v. Bellwood, 12 Bush 139; Powell v. Weiler, 11 B. M. 187.

(57) **Surety against co-surety.** Action can not be maintained by one surety against a co-surety unless the principal is insolvent, and this fact must be averred. Bolling v. Doneghy, 1 Duv. 220; Lee v. Forman, 3 Met. 113.

(58) **Surety against principal.** In action by surety against principal to recover money paid for him the petition alleged that the note was paid in full by plaintiff as surety, and that no part of it had been repaid by defendant. The petition set out a good cause of action on the implied promise. Bridges v. Reed, 9 Bush 329.

(59) **Tavern keeper—to enforce lien on baggage.** The petition must allege that plaintiff is a tavern keeper. Allegation that he "is a landlord, proprietor of the Myers House," is insufficient. Southwood v. Myers, 3 Bush 681.

(60) **Tax title.** Petition in action to recover land under must allege that all the statutory steps necessary to a valid sale were taken. Jones v. Miracle, 14 R. 630; Durrett v. Stewart, 88 Ky. 665; Com. v. Three Forks Coal Co., 95 Ky. 273.

(61) **Title—to quiet.** See Campbell v. Disney, 93 Ky. 41.

§ 92 [120, 121] **Special defined—waiver—costs.** A special demurrer is an objection to a pleading which shows—

1. That the court has no jurisdiction of the defendant or of the subject of the action; or,

(62) **Tolls—to recover.** In action by turnpike company to recover tolls, the petition must allege that defendant promised or agreed to pay tolls sued for. *Russell v. Muldraugh Hill T. P. Co.*, 13 Bush 307.

(63) **Trespass.** No one except the person in actual possession can maintain an action for trespass. *Walden v. Conn*, 84 Ky. 312; *J., M. & I. R. R. Co. v. Esterle*, 13 Bush 607. Actual possession not necessary now to maintain action. See Ky. Stat., sec. 2361.

(64) **Vendor's lien—to enforce.** The petition must set forth the terms of the contract, the character of title to be made, and that the vendor is able and willing to convey according to the contract. *Calvin v. Duncan*, 12 Bush 101; *Williams v. Abrahams*, 3 Bush 186; 79 Ky. 405; 78 Ky. 607, and should describe land sought to be subjected. *Lawless v. Barger*, 9 Bush 665; *Runyon v. Darnall*, 10 Bush 67.

(65) **Writing should be set out.** If action is founded on a writing it should be filed, and so much of it set forth as will show that the plaintiff by reason of alleged acts or omissions on his part, and on part of defendant, is entitled to relief; the petition must contain in its own body and not merely by reference to another paper a statement of facts constituting cause of action. *Hill v. Barrett*, 14 B. M. 83; *Murphy v. Estes*, 6 Bush 532; 14 B. M. 252; 4 Met. 97.

(66) Writing filed with petition will not cure defects in petition. *Huffaker v. Nat. Bank of Monticello*, 12 Bush 287; *Gebhard v. Garnier*, 12 Bush 321; 6 Bush 532; 14 B. M. 83; *ib.* 252; 4 Met. 97; 2 Met. 88; 80 Ky. 368.

(67) If petition does not aver that the contract is in writing, or refer to any writing, it will be presumed it is parol. *Byassee v. Reese*, 4 Met. 371; *Hocker v. Gentry*, 3 Met. 463; 15 B. M. 443; 14 Bush 776.

(68) Upon undertaking to pay debt of another, petition must show undertaking was in writing. *Smith v. Fah*, 15 B. M. 443; *Linn Boyd Co. v. Terrill*, 13 Bush 463; *Smith v. Theobald*, 86 Ky. 141.

§ 92. (1) **Error as to proceeding.** That action is brought in equity when it should have been at law is not ground of demurrer. *Trustees of Leb. v. Forrest*, 15 B. M. 168; 14 B. M. 348, it may be transferred to proper docket, sec. 8.

(2) **Jurisdiction.** When court has no jurisdiction of subject matter, the error is not waived by failing to demur. *Hughes v. Sidwell*, 18 B. M. 259; *Fidler v. Hall*, 2 Met. 461; *Barton v. Barton*, 80 Ky. 212. When the court has jurisdiction of the subject matter, objection to the want of jurisdiction over the person may be waived. *Hughes v. Hardesty*, 13 Bush 304; 4 Bush 619; 80 Ky. 212.

(3) **Parties—defect of.** In action in the name of *A. J. Morrison & Co.* on a note executed to *A. J. Morrison & Co.*, it does not appear from the petition whether *A. J. M. & Co.* is one person or a firm, and demurrer will not lie. *Morrison v. Tate*, 1 Met. 569. If defect does not appear in petition, it must be taken advantage of by answer, or it will be waived. Sec. 118; 17 B. M. 598; *ib.* 642; 3 Met. 134; 3 Bush 200; 80 Ky. 684; 10 Bush 703; and see notes to sec. 118.

(4) **Special demurrer** not necessary when plaintiff has no right at all to maintain action; question can be raised by general demurrer. *L. & N. R. R. v. Brantley*, 16 R.—

(5) **Special demurrer—waiver.** If legal incapacity appear on face of petition, and defendant fails to demur, it is waiver of error. *Petty v. Malier*, 14 B. M. 246; 15 B. M. 584; 12 Bush 327; 80 Ky. 684; 79 Ky. 583.

(6) **Two actions pending.** A brought suit against B in the Wayne Circuit Court to recover property, and the action was transferred to Clinton county. While

2. That the plaintiff has not legal capacity to sue; or,
3. That another action is pending, in this State, between the same parties, for the same cause; ~~or,~~
4. That there is a defect of parties, plaintiff or defendant. Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, except the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing so to make it; but a party failing so to make it when or before he files a pleading, other than a demurrer, is liable for all costs resulting from such failure. (*May be filed in vacation, 109; may be made to part of pleading, 113; ground of shown by pleading, 118.*)

§ 93 (1821) 1. **General defined—costs.** A general demurrer is an objection to a pleading, because it does not state facts sufficient to consti-

pending in the court of latter county, A brought suit in Wayne and obtained an attachment for the same property. The petition showed that the action in Clinton was pending, and that the same property was sought to be recovered in each. A demurrer to petition in Wayne was properly sustained. *Moore v. Sheppard*, 1 Met. 97. But action to enforce lien and action on note secured by the lien may be prosecuted at the same time. *Julian v. Pilcher*, 2 Duv. 254.

(7) An action will not be abated on a plea that there is an action pending between the same parties on the same debt in a court of another State. The Code only applies to actions pending in this State. *Davis v. Morton*, 4 Bush 442.

(8) Pendency of an action in a court that has no jurisdiction does not prevent institution of action in proper court. *Lou. Water Co. v. Clark*, 94 Ky. 47.

(9) If when answer is filed another action is pending between same parties for same purpose, and this fact is relied on in abatement, the plea may be relied on at trial although the other action has been dismissed. *Gist v. Shean*, 8 R. 509.

(10) **Verification—misjoinder.** Objection that petition not verified can not be made by demurrer. *Harris v. Ray*, 15 B. M. 628; it should be by rule to verify. (Nor can misjoinder of parties be reached by demurrer. *Dean v. English*, 18 B. M. 132; see sec. 85.

§ 93. (1) **Admissions by.** Demurrer admits the truth of all facts well pleaded, and every allowable and proper deduction therefrom. *Norman v. Ky. Board of Managers*, 93 Ky. 537; *Morgan v. Ballard*, 1 Mar. 558; *Bank v. Newport*, 1 B. M. 16; but exhibits referred to must be taken into view as controlling any statements inconsistent with them. *Bush v. Maderia*, 14 B. M. 212; *Collins v. Blackburn*, 14 B. M. 252; but see *Green v. Page*, 80 Ky. 368, where it is held that exhibits are not to be considered in determining the sufficiency of a pleading.

(2) The admission of facts by a demurrer is equivalent to proof by a witness in open court. *Francis v. Wood*, 81 Ky. 16; but only facts well pleaded are admitted and not legal conclusions. *Norman v. Ky. Board of Managers*, 93 Ky. 537.

(3) **Answer—effect of.** Defendant waives all objection to petition by answering, except objection to jurisdiction, and that petition does not state cause of action; and upon demurrer to answer, no objection to petition except these can be considered. *Mitchell v. Mattingly*, 1 Met. 237.

(4) After demurrer to petition is overruled and answer filed, no objection to petition is available, unless it amounts to cause for arrest of judgment. *Duncan v. Brown*, 15 B. M. 186.

(5) Where an answer is filed at same time with demurrer, the fact that parties

T. P. H. may demur after the demurrer is filed.
Norman v. Board of Managers 19 Ky. R. Reporter 1847.

tute a cause of action or a defense; or, because it does not state facts sufficient to support a cause of action or a defense.

2. Failure so to make such objection is not a waiver thereof, but a party failing to make it when or before he files a pleading,

proceed to trial without noticing demurrer authorizes inference that demurrer was overruled or waived. *D. L. & N. Co. v. Stewart*, 2 Met. 119.

(6) Filing answer and demurrer at same time does not preclude defendant from waiving right to trial upon merits, and standing by his demurrer. *Bridges v. Reed*, 9 Bush 329.

(7) **Appearance entered by.** Defendant by filing a general demurrer waives his right to thereafter object to the jurisdiction of the court over his person. *McDowell v. C., O. & S.W. R. R. Co.*, 90 Ky. 346; 95 Ky. 277; but does not by making motion to quash return on summons or by filing answer objecting to jurisdiction. *C., O. & S. W. R. R. v. Heath*, 87 Ky. 651; *Barbour v. Newkirk*, 83 Ky. 529.

(8) **Contributory neglect** is a defense which confesses and avoids the plaintiff's case, and as a rule must be affirmatively pleaded, but where the petition states facts showing that injury sued for was caused by neglect of plaintiff it may be reached by demurrer. *Favre v. L. & N. R. R.*, 91 Ky. 541.

(9) **Costs on.** The failure of a party to demur at proper time does not render him liable for costs unless he subsequently enters a demurrer. *American Wire Co. v. Bayless*, 91 Ky. 94.

(10) **Defects in form.** Defects in form of pleading can only be reached by motion to make averments more specific. *Posey v. Green*, 78 Ky. 162; *ib.* 210. See sec. 134.

(11) Although petition fails to show that party is entitled to the specific relief asked, if it shows a right to any relief a demurrer should not be sustained. *Foster v. Watson*, 10 B. M. 377.

(12) Setting out several defenses in one paragraph is not cause of demurrer; the objection can be reached by motion to paragraph. *Williams v. Langford*, 15 B. M. 566; see sec. 113-3. And if one of

several paragraphs in an answer presents a defense a demurrer should not be sustained to it as a whole. *Archer v. Nat. Ins. Co.*, 2 Bush 226.

(13) **Demurrer brings all previous pleadings** before the court, and judgment on the demurrer should be against party who committed first error. *Wile v. Sweeney*, 2 Duv. 161; *Young v. Duhme*, 4 Met. 239; *Martin v. McDonald*, 14 B. M. 544; 1 Met. 237; 79 Ky. 487.

(14) **Judgment on demurrer—bar.** An order sustaining a demurrer can not be appealed from unless a judgment follow it. *Alexander v. de Kermel*, 81 Ky. 345; but see *Zable v. Orphans' Home*, 92 Ky. 89.

(15) Judgment on demurrer, unless petition states cause of action, is no bar to future action alleging facts entitling plaintiff to recover; but he will not be allowed, after setting forth a state of facts in his petition, whether sufficient or insufficient to authorize a recovery after a general demurrer has been sustained to his pleading and his action dismissed, to bring another action setting forth substantially the same facts. *Woolley v. Lou. Banking Co.*, 81 Ky. 527; *Birch v. Funk*, 2 Met. 544; *Thomas v. Bland*, 91 Ky. 1; 81 Ky. 16; *ib.* 345.

(16) **Limitation.** Demurrer to petition upon ground that action is barred by limitation can not be sustained unless petition shows not only a sufficient lapse of time, but the non-existence of any ground of avoidance. *Rankin v. Turney*, 2 Bush 555; *Board v. Jolly*, 5 Bush 86; *Chiles v. Drake*, 2 Met. 146. But when the petition shows that the action is barred, and that plaintiff is not within any of the exceptions contained in the statute which save his right to sue, a demurrer will be sustained. *Stillwell v. Leavy*, 84 Ky. 379.

(17) **Misjoinder.** That amended petition departs from cause of action is not ground for demurrer. Motion to strike

other than a demurrer, shall be liable for all costs resulting from such failure. (*May be filed in vacation, sec. 109; may be made to part of pleading, sec. 113.*)

§ 94 ²² **Amendment after demurrer—costs.** If the court sustain the demurrer, the party may amend the pleading, with leave of court; but in all cases he shall pay the costs resulting from the demurrer.

CHAPTER IV.

ANSWER, COUNTER-CLAIM, SET-OFF, CROSS-PETITION.

§ 95. Answer—what it may contain.

§ 96. Counter-claim, set-off, cross-petition.

§ 97. Proceedings upon counter-claim, set-off, cross-petition—caption.

§ 95 ⁽¹³³⁾ **Answer—what it may contain.** An answer may contain—

1. A traverse.

out is proper way to reach misjoinder. *Hord v. Chandler*, 13 B. M. 402. See sec. 85, and sec. 113-4.

(18) **Misnomer of writing.** The misnomer of writing sued on is not cause of demurrer. *Bradley v. Mason*, 6 Bush 602.

(19) **Objection in Court of Appeals** to sufficiency of petition is confined to the point that it does not state facts sufficient to constitute a cause of action, and if the issue in lower court was made by answer or submitted to and tried by a jury, defects in petition must be disregarded in Court of Appeals. *Davis v. Wiley*, 3 R. 315.

(20) **Petition how tested.** On general demurrer to petition, its sufficiency should not be tested by blending with its averments any matter of defense defendant may have. *Yewell v. Bradshaw*, 2 Duv. 573; *Macklin v. Trustees*, 88 Ky. 592.

(21) **Practice.** A general demurrer to an answer containing several paragraphs is not good if either of the paragraphs presents a defense, but upon a demurrer to "each of the paragraphs" it is proper to sustain it as to those that are defective. *Sanford v. Lowenthal*, 5 R. 206.

(22) Plaintiff filed two amended petitions, and then defendant demurred to "whole case;" this, though inartificial, put in issue sufficiency of all facts set

out in petition and amendments. *Miles v. Collins*, 1 Met. 308.

(23) Where the court erroneously sustains a general demurrer it is proper afterward to disregard the ruling. *Stevenson v. Flournoy*, 89 Ky. 561; and although a defendant does not demur to the petition the court has a right upon the final hearing to decide that no cause of action is presented. *American Wire Nail Co. v. Bayless*, 91 Ky. 94.

(24) When demurrer to answer is carried back to petition, the petition is to be considered without reference to answer or exhibits filed with it, although a demurrer to petition has been overruled before filing of answer. *Macklin v. Trustees*, 88 Ky. 592.

(25) **Special demurrer** is not necessary where plaintiff has no right at all to maintain action; objection can be made by general demurrer. *L. & N. R. v. Brantley*, 16 R.—

(26) **Statute of frauds.** When petition shows want of necessary writing, it is not necessary to plead statute of fraud; question can be raised by demurrer. *Linn Boyd Co. v. Terrill*, 13 Bush 463; *Smith v. Theobald*, 86 Ky. 141.

§ 94. See notes to sec. 134.

§ 95. (1) **Accord and satisfaction.** To make the plea good, it should be alleged that the matter was accepted in satisfac-

2. A statement of facts which constitute an estoppel against, or avoidance of, a cause of action stated in the petition.

tion. Averment that the party agreed to accept it in satisfaction is bad pleading. *Johnson v. Hunt*, 81 Ky. 321. See *Williams v. Langford*, 15 B. M. 566.

(2) **Administrator against distributee.** To a suit brought on a note by an administrator against husband of distributee, the answer stated that no distribution had been made and asked to be allowed to retain amount as advancement; held not good because it did not aver that administrator had in his hands for distribution an amount sufficient to entitle each distributee to a sum equal to amount of note. *Haggard v. Hay*, 13 B. M. 174.

(3) **Amended petition.** No answer is required to amended petition when the denials of the answer to petition are sufficient, and apply as well to the amended as to the original petition. *Robinson v. Williamson*, 7 Bush 604.

(4) **Attachment without cause.** In action for suing out an attachment without good cause the answer was "that the grounds alleged by the defendant as constituting the cause for its issue did in fact, as he believes, exist and were true;" held insufficient. *Mitchell v. Mattingly*, 1 Met. 237.

(5) **Conclusions of law.** In action to recover homestead, statement in answer that defendant is an "innocent purchaser" is merely a conclusion of law. *Wing v. Hayden*, 10 Bush 276.

(6) In action against carrier for loss of goods, averment in answer that accident was unforeseen, inevitable or unavoidable, or that it was caused by dangers of the river, are conclusions of law and not good; the facts should be stated. *Bentley v. Bustard*, 16 B. M. 643.

(7) In action against sheriff for failing to collect execution, answer stating that all the property owned by execution defendant was exempt from execution, without averring that he was a housekeeper with a family, is bad. *Com. v. Lay*, 12 Bush 283.

(8) **Conjunctive denial.** Denial in the con-

junctive is not good. *Taylor v. Farmer*, 81 Ky. 458; nor can two or more facts be grouped together and denied; each material fact must be separately denied. *Preston v. Roberts*, 12 Bush 570.

(9) **Decedent's estate.** In suit for settlement of an estate, creditor may file petition setting up his claim, and if claim is controverted, has a right to demand that it shall be done by answer, as in other cases. *Horner v. Harris*, 10 Bush 357.

(10) **Defective allegations in petition cured by answer or verdict.** It is a settled rule of practice that defective allegations of the plaintiff's pleading may be supplied and cured by the answer; and the doctrine of the Code is that verdicts and judgments which have been rendered upon substantial issues of fact fairly presented by the pleadings shall not be disturbed on account of mere technical defects not affecting the merits of the controversy. Code, sec. 134. *Riggs v. Maltby*, 2 Met 88; the failure to allege a fact that would have rendered the petition bad on demurrer will be cured by an answer denying the existence of the fact. *L. & N. R. v. Lawson*, 88 Ky. 496; *Pugh v. White*, 78 Ky. 210; 78 Ky. 485; 78 Ky. 463; 13 Bush 601; 82 Ky. 291; but if the petition fail to allege matter which is essential to make out a cause of action the defect will not be cured by answer. *Bogenschutz v. Smith*, 84 Ky. 330; *Drake v. Semonin*, 82 Ky. 291.

As to defects cured by verdict—"The rule is that when there is any defect, imperfection or omission, even of substance, in a pleading which would have been fatal on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so imperfectly stated or omitted, and without which it is not to be presumed the judge would direct the jury to give, or that the jury would have given, the verdict, such defect or omission is cured by the verdict." *Drake v. Semonin*, 82 Ky. 291; *L. & P. Canal Co. v. Murphy*, 9 Bush 522; the rule is that all ambiguities and uncer-

3. A statement of facts which constitute a set-off or counter-claim.
4. A cross-petition. (*Forms of answers, pages 617-622; time of fil-*

tainties in pleadings will be construed against the pleader before verdict, yet after verdict pleadings will be liberally construed to uphold it. *Worthly v. Hammond*, 13 Bush 510; and see *E. & P. R. R. Co. v. Pottinger*, 10 Bush 185; 10 Bush 169; but verdict will not cure failure to allege matter essential to make out a cause of action. *Bogenschutz v. Smith*, 84 Ky, 330; *Drake v. Semonin*, 82 Ky. 291.

(11) **Defense by one that goes to merits** of action presents defense for all. *Rouse v. Howard*, 1 Duv. 31; *Williams v. Rogers*, 14 Bush 776.

(12) **Defenses to be pleaded.** The Code requires all defenses, equitable as well as legal, to be pleaded to an action at law; and an equitable right available may be lost unless thus litigated. *Hackett v. Schad*, 3 Bush 353; sec. 113-2.

(13) **Denial of knowledge or information.** Want of knowledge or information sufficient to form a belief is not sufficient denial of the alleged presentation, demand, refusal of payment and protest of a bill, when the bill showing these facts is filed with petition. *Gridler v. F. and D. Bank*, 12 Bush 333; *ib.* 287. Nor is denial that note was duly protested, or that party received legal notice of protest, sufficient. 7 Bush 474; 12 Bush 287. Denial of knowledge or information by a personal representative is equivalent to a direct denial. *Drake v. Semonin*, 82 Ky. 291.

(14) When the record as made up when plea is filed furnishes the necessary information, or when the fact is necessarily within the personal knowledge of the party, the plea of want of knowledge or information is not good. *Barrett v. Godshaw*, 12 Bush 592; *ib.* 333; *Augustus v. Holt*, 13 R. 8.

(15) **Denial of knowledge sufficient to form a belief is not good**; it should be a denial of any knowledge or information. *Trustees v. Fleming*, 10 Bush 234; and

see *C. & S. R. R. Co. v. Gray*, 10 R. 292.

(16) That defendant "knows nothing on the subject of his own knowledge" is not sufficient. *Terrill v. Jennings*, 1 Met. 450. That defendant has "no knowledge of any of the facts set up in the petition, and no means of forming a belief, and therefore denies them all and requires *proff.*" is not good denial. *Corbin v. Com.*, 2 Met. 380. Statement that defendant does not admit certain facts and calls for proof, or does not owe debt sued for, is not sufficient denial. *Clark v. Finnell*, 16 B. M. 329. See *Hutchins v. Moore*, 4 Met. 109; and answer which merely denies "each averment of the petition" is no answer at all. *Evans v. Evans*, 93 Ky. 510.

(17) An answer to suit for goods sold and delivered, denying "that defendant is, to the best of his knowledge and belief, indebted to the plaintiff as stated in petition," is insufficient. *Francis v. Francis*, 18 B. M. 57; 8 Bush 583. Nor is a denial that defendant is indebted as alleged, or that account is just, sufficient. *Thruston v. Oldham*, 6 Bush 16.

(18) It is only where the allegations of the petition are not necessarily within the knowledge of the party charged, that this character of denial is good; as where the party is sought to be made liable for the action or misconduct of others, or where some fact is asserted that defendant could not say whether it is true or false. *Wing v. Dugan*, 8 Bush 583; 12 Bush 608. Questions of law can not be denied by a statement of want of knowledge or information sufficient to form a belief. *Ky. Nav. Co. v. Com.*, 18 Bush 435; 83 Ky. 410.

(19) In action against carrier for neglect in carrying goods a specific denial of its negligence is necessary. *N., C. & St. L. R. R. v. Carrico*, 95 Ky. 489.

(20) **Denial of title.** When a vendor sues to enforce an executory contract,

ing, secs. 102, 104; may be filed in vacation, secs. 107, 108; traverse defined, sec. 113; what allegations must be traversed, secs. 126.)

averring that he is able, ready and willing to convey title, and tenders conveyance, vendee must aver he has no title; or, if it is defective, must point out defects. *Logan v. Bull*, 78 Ky. 607.

(21) In an action on a note executed for price of a slave, statement in answer "that the vender had no title and had not and could not make any title" does not present a defense, as it fails to aver any warranty of title. *Patrick v. Swinney*, 5 Bush 421.

(22) **Fraud.** Answer averring that writing sued on was obtained, or its execution procured, by fraud, misrepresentation and covin, without specifically averring the facts constituting the fraud, is good. *Evans v. Stone*, 80 Ky. 78; *Whitehead v. Root*, 2 Met. 584.

(23) **General denial.** To a suit for \$620, balance due for merchandise, without any specification of articles sold, defendant answered, denying that she was indebted in more than \$500. Held good defense to all over \$500. If petition, or account filed with it, specified items, answer would not be good. *Webb v. Jeffries*, 2 Bush 321.

(24) Answer to a suit on a note denying that defendant owes the debt, or any part of it, is not good. *Haggard v. Hay*, 13 B. M. 174. Answer denying that defendant is indebted as alleged, or that the account is just, is not good. *Thruston v. Oldham*, 6 Bush 16.

(25) Denial of the correctness of each and every item of the account sued on is insufficient. *Whitaker v. Sandifer*, 1 Duv. 261; and see *Baum v. Winston*, 3 Met. 127. To present good denial, answer should controvert separately and specifically each charge made in the petition. *Morgan v. Booth*, 13 Bush 480.

(26) **Inconsistent defenses.** Party may plead as many defenses as he has; provided they are not inconsistent, sec. 113-4. In an action for slander defendant can not in one paragraph deny, and in another one admit, the speaking, and justify. *Rooney v. Tierney*, 82 Ky. 253.

It was otherwise under Code of 1854; see 10 Bush 447.

(27) **Infancy.** Statement in answer that "at the time of the execution of the note sued on defendant was an infant under the age of twenty-one years," is a good plea of infancy. *Stern v. Freeman*, 4 Met. 308.

(28) **Legislature no power to prescribe** form of answer that cuts off substantial defenses by limiting defendant to certain defenses. *City of Lou. v. Cochran*, 82 Ky. 15; *Meguiar v. Henry*, 84 Ky. 1.

(29) **Limitation.** Statute of limitation must be pleaded, although action be apparently barred, unless the petition shows the non-existence of every ground of avoidance. *Chiles v. Drake*, 2 Met. 146; 5 Bush 86; 2 Bush 555. But when petition shows that action is barred and that plaintiff is not within any of the exceptions contained in the statute, question can be made by demurrer. *Stillwell v. Leavy*, 84 Ky. 379.

(30) **Misnomer of defendant.** As to effect of when defendant enters appearance. See *Heckman v. L. & N. R. R. Co.* 85 Ky. 631; *L. & N. R. R. Co. v. Hall*, 12 Bush 131.

(31) **No consideration.** Plea that a note, bond or other like instrument was given without any consideration is good. *Evans v. Stone*, 80 Ky. 78; and see *Coyle v. Fowler*, 3 J. J. M. 472.

(32) **Non est factum.** Plea of *non est factum* must be made in affirmative language and sworn to. *Trustees v. Fleming*, 10 Bush 234; *Dugan v. Harris*, 6 R. 596; see Ky. Stat., sec. 473.

(33) Under general plea of *non est factum*, a question as to the conditional signing and delivery of a writing can not be considered; it must be specially pleaded. *Hall v. Smith*, 14 Bush 604.

(34) **Nul tiel record.** Plea of *nul tiel record* is not good in an action in this State on the judgment of a justice of the peace of another State. *McElfatrick v. Taft*, 10 Bush 160.

§ 96 ^[126, 128] **Counter-claim, set-off, cross-petition.** 1. A counter-claim is a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract, or transaction, stated in

(35) **Statute of frauds.** It is not necessary to answer and rely on the statute of frauds when petition shows want of necessary writing; question can be made by demurrer. *Linn Boyd Co. v. Terrill*, 18 Bush 463; *Smith v. Theobald*, 86 Ky. 141.

(36) **Taxes.** Set-off is not allowable against demand for taxes unless expressly authorized by statute. *Anderson v. City of Mayfield*, 93 Ky. 230.

(37) **Traverse.** Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed (sec. 126). A material allegation is one which is necessary for the statement or support of a cause of action or defense (sec. 127). A traverse is a denial of facts alleged in an adverse pleading. See sec. 113-7; and each material fact must be denied separately, it will not do to group two or more facts together and deny them. *Preston v. Roberts*, 12 Bush 570; *Morgan v. Booth*, 13 Bush 490; nor is a denial in the conjunctive good. 81 Ky. 458.

(38) An answer which merely denies "each averment of the petition" is no answer at all. *Evans v. Evans*, 93 Ky. 510; nor is denial that defendant is indebted as alleged, or that account is just, sufficient. *Thruston v. Oldham*, 6 Bush 16.

§ 96. (1) **Counter-claim.** "First, those causes of action which arise out of the contract set forth in the plaintiff's petition as the foundation of his claim; secondly, those causes of action arising out of the transaction set forth in the petition as the foundation of the plaintiff's claim; and, thirdly, those causes of action connected with the subject of the suit." *Newman's Pleading and Practice*, page 602. Counter-claim is an action (sec. 732-34), and may be presented in a reply against a set-off (sec. 98-3). The caption of the answer should contain the words "answer and counter-claim" (sec. 97-4). *Nutter v. Johnson*, 80 Ky. 426; *Cason v. Cason*, 79 Ky. 558. The

(6)

only restriction the Code makes as to a counter-claim is, that it shall be a cause of action arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's demand; or that it be connected with the subject of the action. It is not required that the counter-claim itself shall be founded in contract or arise out of the contract set forth in the petition, but it is sufficient that it arises out of the transactions set forth in the petition or be connected with the subject of the action. *Tinsley v. Tinsley*, 15 B. M. 454; *Forbes v. Cooper*, 88 Ky. 285.

(2) **Dismissal of action** without prejudice does not prevent prosecution of counter-claim, but it is too late after motion to dismiss is entered to file counter-claim. *N. W. Ins. Co. v. Barbour*, 95 Ky. 7; and defendant is entitled to trial of although plaintiff dismiss his action or fail to appear. Sec. 372.

(3) **Generally.** A sold B a jack, and gave him a covenant of warranty signed by A and D. In a suit by A on the note given for the price of the jack, Held, that B could not make his answer a counter-claim against D on the covenant of warranty for a breach of it; as D was not a plaintiff, and as A pleaded *non est factum* to the covenant and succeeded. *Wells v. Boyd*, 1 Duv. 366. Under Code of 1854 counter-claim was only allowed against plaintiffs.

(4) In an action for the contract price of a bridge, the defendant can plead as a counter-claim damages for the failure of plaintiff to build the bridge according to contract. *Moore v. Caruthers*, 17 B. M. 669; 10 Bush 169.

(5) M agreed that if H, as surety for L, would sign a note executed to him by L, he would procure the signature of G as co-surety. In a suit by M on the note, H pleaded as a counter-claim the damages he sustained by the failure of M to procure the signature of G. *Murphy v. Hubble*, 2 Duv. 247.

the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action. (*See further, secs. 99, 372.*)

(6) Purchaser of property at a sale by administrators can not, in an action on the note executed for the property, plead as a counter-claim the conversion of part of the property by one of the administrators, after the sale, in his individual capacity. His remedy is by cross-petition. *Phillips v. Keifer*, 2 Met. 478.

(7) In action by the mortgagor against the mortgagee for taking possession of the mortgaged property before debt due, the mortgagee can plead as a counter-claim the mortgage debt. *Brown v. Phillips*, 3 Bush 656.

(8) In action by a railroad company on a subscription toward building the road, the defendant may plead as a counter-claim an agreement made at the time of subscription, that any damage done to his property by the road might be set-off against subscription, and the damage so caused is a valid counter-claim. *L. & N. R. R. Co. v. Thompson*, 18 B. M. 735.

(9) In proceeding by mandamus to compel a county court to levy a tax to pay for a bridge, counter-claim can not be set up to recover back, money paid on bridge; but may be maintained for defective execution of the work as a defense against balance due. *Anderson Co. v. Stone*, 18 B. M. 848.

(10) L sued J on a promise to indemnify him as surety of H to recover money paid as such surety. J pleaded as a counter-claim that H had given L a mortgage to secure him in part of the money paid as surety, and asked that the mortgage be foreclosed. Held not a good counter-claim, not being connected with the subject of the action. *Jones v. Letcher*, 13 B. M. 363.

(11) In a suit by a widow for dower against vendee of her husband, the vendee can not, by counter-claim against the heirs of the vender, recover on the warranty. *Hill v. Golden*, 16 B. M. 551.

(12) G sold to C a mill and accounts due; one of the accounts being against M, he required C to deduct from it \$190. In an action by G against C to recover

the contract price, C pleaded as a counter-claim the reduction made to M. *Cook v. Gray*, 2 Bush 121.

(13) A sued B and obtained an attachment. B controverted the grounds of attachment, and made his answer a counter-claim, claiming damages for maliciously suing out attachment. Held not a good counter-claim. *Nolle v. Thompson*, 3 Met. 121.

(14) In action on foreign judgment, defendant can plead as a counter-claim a cause of action dismissed for want of prosecution, in the court where judgment rendered. *Rankin v. Barnes*, 5 Bush 20.

(15) In action upon a note executed for an interest in a partnership, defendant can plead as a counter-claim damages resulting to the business of the firm by the fraud and dishonest conduct of the other partners. *Boughner v. Black*, 83 Ky. 521.

(16) In an action for trespass to land, the plaintiff averred title in himself; the defendant alleged that he was owner of land, and sought by counter-claim to recover it. Held that he could maintain counter-claim. *Whitlock v. Ledford*, 82 Ky. 390.

(17) In an action for an assault, defendant may plead as a counter-claim damages for an assault committed on him by plaintiff at same time as assault complained of in petition. *Slone v. Slone*, 2 Met. 339.

(18) In an action on an injunction bond to recover damages for being kept out of the possession of land, the defendant who had possession of the land during pendency of injunction can plead, as a counter-claim, any interference by plaintiff which rendered the use of the land less valuable to the defendant. *Tinsley v. Tinsley*, 15 B. M. 454.

(19) In an action for trespass by A against B, the purchaser of A's land under a void execution, B having paid the execution debt, can not plead the amount so paid as a counter-claim. *Geoghegan v. Ditto*, 2 Met. 434.

2. A set-off is a cause of action arising upon a contract, judgment or award in favor of a defendant against a plaintiff, or against him

(20) In action by wife for divorce she set up claim to a tract of land, her husband answered and averred that through mistake his name was omitted from deed conveying land to wife and children, and his answer asking to have deed reformed was properly made a counter-claim against wife and children. *Grimes v. Grimes*, 88 Ky. 20.

(21) Partner when sued for a firm debt has the right to rely upon any counter-claim that the firm could have asserted if sued. *McMasters v. Burnett*, 92 Ky. 358.

(22) *Requisites of.* A pleading to be treated as a counter-claim should contain, not facts merely constituting a defense, and pleaded as such, but should present a cause of action in favor of defendant, supported by every allegation necessary to uphold an original petition founded thereon. *Bowen v. Sebre*, 2 Bush 112; *Davis v. Dycus*, 7 Bush 4; 4 Met. 57; *ib.* 110.

(23) *Separate action on.* Party when sued is not bound to set up by way of counter-claim any claim he may have against the plaintiff, but may, after judgment against him, assert in a separate action his claim. Sec. 17; *Emmerson v. Herriford*, 8 Bush 229; 1 Duv. 321; 2 Met. 92; 3 Met. 274.

(24) *State—in action by.* A party sued by the Commonwealth can rely on counter-claim as a defense to defeat recovery, but can not obtain judgment over on it. *Com. v. O. & N. R. R. Co.*, 81 Ky. 572; *Com. v. Todd*, 9 Bush 708; 1 Duv. 86.

(25) *Trial of.* When a counter-claim is relied upon, and there is an issue as to its validity, if, upon the trial of this issue, the jury should find damages in favor of the defendants to an amount equal to the demands of plaintiff, the finding should be in favor of the defendants; and if they should find damages of a less amount than the demands of plaintiff, they should give credit for this amount, and find for plaintiff the remainder. But if the defendants should, in the opinion of the jury, be entitled to nothing, then the plaintiff should have

judgment for his whole claim. *Moore v. Caruthers*, 17 B. M. 669.

(26) *Verification of claim* against decedent's estate pleaded as a counter-claim in action brought by personal representative is necessary, but demand is not. *Warfield v. Gardner*, 79 Ky. 583.

(27) *Warranty*—damages for breach of may be relied on as counter-claim in an action to recover price of article sold. *Garner v. Jones*, 94 Ky. 135.

SET-OFF.

(1) *Administrator—distributee.* Administrator or heirs may plead asset-off against distributee's interest his indebtedness to the estate. *Brown v. Mattingly*, 91 Ky. 275.

(2) *Assignee—against.* A set-off to be available against an assignee must have existed before notice of the assignment. A debt or demand can not be used as a set-off before it becomes due, and unless it is due before notice of the assignment, it is not available as a set-off against the assignee. A surety until he pays the money for his principal has no demand against him which can be pleaded as a set-off, even if the principal is insolvent. *Walker v. McKay*, 2 Met. 294; 1 Met. 112; and see *Chenault v. Bush*, 84 Ky. 528. *Henderson N. Bk. v. Lagow*, 3 R. 173; nor will a party who has notice that his note has been assigned, although he may not know to whom, be allowed to buy up claims against assignor and set them off against note. *Small v. Browder*, 11 B. M. 213.

(3) *Assignment of note to be used as.* Defendant can plead as a set-off a note of the plaintiff assigned to him under a contract to use the note as a set-off, and account to the assignor only for the amount he can make in that way, and reassign the balance remaining unpaid. *Graham v. Tilford*, 1 Met. 112; *Dorsey v. Reese*, 14 B. M. 157. But where a note is so assigned, to be used as a set-off, a court of equity, where the rights of others than the party who owes the note intervene, would be reluctant to sanction such a speculation by aiding the party making the venture to defeat an acknowledged equity. Such contracts are not to be

and another; and it can not be pleaded except in an action upon a contract, judgment or award. (*See further, secs. 97, 372.*)

avored, but where the debtor alone is affected, he will not be heard to complain. *Tinley v. Martin*, 80 Ky. 463.

(4) **Commonwealth—action by.** In a suit by the Commonwealth against a citizen, the latter may by way of set-off make such defense as will defeat recovery, but can not get judgment over. *Com. v. O. & N. R. R. Co.*, 81 Ky. 572; 9 Bush 708; and see *Sinking Fund Comr. v. Northern Bank*, 1 Met. 174.

(5) The Commonwealth by its judgment against the sheriff obtained a lien on the sheriff's claim against his deputy; but if the deputy, as surety for the sheriff, has been compelled to pay money for him before the lien of the Commonwealth attached, the sum so paid is a valid set-off against the Commonwealth. *Harlan v. Lumsden*, 1 Duv. 86.

(6) **Co-surety who pays entire debt** may plead the amount he is entitled to recover from his co-surety as a set-off to an action against him by the general assignee of said surety on a note executed by him to such surety, although the debt did not mature nor was it paid by him until after the assignment. *Chenault v. Bush*, 84 Ky. 528.

(7) **Damages unliquidated.** A demand for unliquidated damages for breach of warranty of the quality of a commodity for which the note sued on was executed may be relied on as a set-off against the note when the vender is insolvent or a non-resident. *Forbes v. Cooper*, 88 Ky. 285; *Taylor v. Stowell*, 4 Met. 175; and see *Boyd v. Day*, 3 Bush 617; *Adams v. Craycroft*, 1 R. 330. But where there is an adequate remedy at law, and no facts such as insolvency or non-residence are shown, unliquidated damages, although arising upon a contract, can not be pleaded as a set-off. *Garner v. Jones*, 94 Ky. 135; *Shropshire v. Conrad*, 2 Met. 143.

(8) **Decedent's estate—against.** A claim against a decedent pleaded as a set-off must be verified and proved as claims are required to be when sued on by original action; affidavit in body of petition is not sufficient; no demand is necessary.

Warfield v. Gardner, 79 Ky. 583. Distributee can not plead amount due him as a set-off in a suit by the administrator, in an action pending in county in which administrator did not qualify. 3 Met. 322.

(9) In a suit by an administrator, the defendant had a right to plead, as a set-off, a demand due him by a decedent whose estate plaintiff's intestate wrongfully appropriated. *McKenzie v. Pendleton*, 1 Bush 164.

(10) If an administrator is charged in the settlement of the estate with a note taken as administrator, and afterward sues on it, the obligor can set-off against it an individual demand due by the administrator. *Jones v. Everman*, 15 B. M. 631.

(11) **Dedication of fund** by order of county court to payment of certain debts precluded sheriff from pleading as set-off to suits by persons entitled to fund amount due him on general account. *Gearhart v. Pritchard*, 2 R. 225.

(12) **Demands must be mutual.** To authorize a set-off, there must be mutual subsisting demands at the commencement of the action. *Hayes v. Goodwin*, 4 Met. 80; 14 B. M. 133.

(13) Debt due by one member of a partnership can not be set-off against a claim due to the firm. *Warder v. Newdigate*, 11 B. M. 174.

(14) Administrator can not set-off debt due to himself, against a debt due by the decedent. *Com v. Bosley*, 5 Bush 221; nor can a demand due by an intestate be pleaded as a set-off to a bond given to his administrator. *Cummings v. Williams*, 5 J. J. M. 384.

(15) Receiver appointed by the court can not retain funds collected, and pay the person to whom the court directs the funds to be paid, in individual claims held against him. *Johnson v. Gunter*, 6 Bush 534.

(16) **Dismissal of action** does not prevent defendant from prosecuting set-off, but after plaintiff has entered motion to dismiss petition without prejudice it is too late to file set-off. *N. W. Ins. Co. v. Barbour*, 95 Ky. 7; and if plaintiff dis-

3. A cross-petition is the commencement of an action by a defendant against a co-defendant, or a person who is not a party to the action, or against both; or by a plaintiff against a co-plaintiff, or a person who is not a party to the action, or against both; and is not allowed to a defendant, except upon a cause of action which affects, or is affected by, the original cause of action; nor to a

misses his action or fails to appear defendant may prosecute his set-off. Sec. 372.

(17) *Equitable set-off*. A bank having on deposit money due a depositor who makes an assignment for the benefit of creditors may apply deposit to payment of debt due by depositor, although it is not due when assignment is made. Ky. Flour Co. v. Merchants Bank, 90 Ky. 235; and see Masonic Bank v. Bangs, 84 Ky. 135; Chenault v. Bush, 84 Ky. 528.

(18) *Ex delicto*. In an action on a note, the defendant has a right to waive an action *ex delicto*, and plead as a set-off the value of property wrongfully taken by the plaintiff, and recover the value of the property converted on an implied promise to pay it. Eversole v. Moore, 3 Bush 49; Haddix v. Wilson, 3 Bush 523; and see Boyd v. Day, 3 Bush 617; Adams v. Craycroft, 1 R. 330.

(19) *Generally*. Where a housekeeper with a family owns but one cow and sells her to enable him to buy another giving milk, the purchaser, knowing why the cow is sold, will not be allowed to set-off against the purchase price a debt due him by the seller. Mulliken v. Winter, 2 Duv. 256.

(20) In an action against the debtor of a bank brought by commissioners in whose hands the funds of the bank were placed, the debtor can plead as a set-off a claim due him from the bank at the date of its assignment. Finnell v. Nesbit, 16 B. M. 351; and see Chenault v. Bush, 84 Ky. 528.

(21) Where it is agreed that money received, or to be received, is to go in satisfaction of a particular demand, the chancellor has power to enforce the contract by decreeing the set-off. Lansdale v. Mitchell, 14 B. M. 348.

(22) The trustees of a school being personally liable to a teacher for the amount of his salary, in action by one of

them upon a note, he could plead the amount due him as teacher as a set-off. Harrison v. Slone, 4 Bush 577.

(23) Two persons mutually indebted, executed, each to the other, notes for the amount of their indebtedness for the purpose of raising money on the notes. In a suit on one of the notes by an assignee, it was held that the payor could not plead the note he held as a set-off. Barbaroux v. Barker, 4 Met. 47.

(24) A purchaser of land under a void execution who pays the purchase money to the execution plaintiff can, in a suit against him for trespass by the execution defendant who is insolvent, set off the amount so paid. Geoghegan v. Ditto, 2 Met. 433.

(25) In an action on a note the defendant who was surety could plead as a set-off the value of the principal's property converted by the plaintiff as executor *de son tort*. Finnell v. Meaux, 3 Bush 449.

(26) Set-off can only be pleaded in an action on a contract. Brown v. Phillips, 3 Bush 656.

(27) A sheriff failing to return an execution in favor of a receiver, and against the administrator of an estate, was sued by the receiver for the amount of execution. Held that the sheriff could plead as a set-off the amount paid by the administrator to certain creditors for whose benefit the receiver was collecting the money. Com. v. Bosley, 5 Bush 231.

(28) On a void sale of infant's land the purchaser paid the guardian \$100. In a suit to recover the land and rent, the purchaser could plead as a set-off against the rent the money so paid. Anderson v. Layton, 3 Bush 87.

(29) An indorser paid a bill, and sued the acceptor, who pleaded that he accepted the bill for the sole benefit of the drawer, who died insolvent, and that the indorser was indebted to the estate of

plaintiff, except upon a cause of action which affects, or is affected by, a set-off or counter-claim. (*In what pleadings counter-claim and set-off allowed, sec. 111; trial of, sec. 372; judgment on, sec. 387; in what pleading cross-petition allowed, secs. 111, 692.*)

the drawer in the amount of the bill. Held a good set-off. *Bowman v. Wright*, 7 Bush 375.

(30) A party proceeded against to recover money paid on a judgment that has been reversed may plead as a set-off a demand against the claimant if he is insolvent or a non-resident. *Carson v. Carson*, 2 Met. 96.

(31) **Limitation.** Limitation against set-off ceases at commencement of action. *Hayes v. Goodwin*, 4 Met. 80.

(32) **Note payable in another State,** and by the laws of that State placed upon the footing of a bill of exchange, is not subject to set-off in this State in hands of an innocent holder. *Stevens v. Gregg*, 89 Ky. 461; overruling *Davis v. Morton*, 5 Bush 160.

(33) **Pleading—practice.** All objections to matter pleaded improperly as a set-off are waived by replication and issue. *Boyd v. Day*, 3 Bush 617. Answer presenting merely matter of defense can not be treated as a set-off, though it may be so called. *True v. Triplett*, 4 Met. 57.

(34) The pleading intended as a set-off must be so designated in the caption. Sec. 97-4. The word action embraces a set-off. Sec. 732-34; 79 Ky. 583.

(35) When a set-off is relied on in an answer, which is also made a cross-petition against parties not before the court, the plaintiff is not bound to reply to the set-off until the parties to the cross-petition are before the court, and it can not be taken for confessed against him. *Scott v. Wilson*, 2 Bush 603.

(36) **Taxes.**—Set-off not admissible against demand for unless expressly authorized by statute. *Anderson v. City of Mayfield*, 93 Ky. 230; and see *Newport Bridge Co. v. Douglass*, 12 Bush 673; *Com. v. Rodes*, 5 Mon. 318.

(37) **Usury—waiver.** Obligor who has executed a new note to an assignee for the debt including usury can not, when sued on new note, set up the usury as a

set-off. *Stone v. McConnell*, 1 Duv. 54; *Clark v. Rodes*, 12 Bush 13.

(38) **Waiver of objection to set-off improperly pleaded.** It is too late after issue joined to object that set-off could not be relied on. *Boyd v. Day*, 3 Bush 617; *Adams v. Craycroft*, 1 R. 330; *Williams v. Porter*, 7 R. 527.

CROSS-PETITION.

(1) The provisions of sec. 90 apply to cross-petitions, sec. 97-1, 3.

(2) **Pleading—practice.** A sued B for the price of a jack, B answered, setting up a writing, signed by A and D warranting the jack, and sought to recover on it as a cross-petition against D; A pleaded *non est factum* to the writing and was released. Held that B could not recover on his cross-petition against D, as it set up a cause of action not affected by the original action. *Wells v. Boyd*, 1 Duv. 366.

(3) In an action brought by a creditor of an estate against the devisees and administrator to recover a debt, the administrator can not, by cross-petition against the devisees, recover a balance due him from the estate; nor can the devisees maintain cross-petition against the administrator for a *devastavit*. *Crabbtree v. Banks*, 1 Met. 482; 17 B. M. 10.

(4) In an action to enjoin a judgment on the ground that plaintiff was released by limitation, the defendant can not maintain cross-petition against the sheriff for failing to return in time an execution on the judgment. *Royse v. Reynolds*, 10 Bush 286.

(5) In an action by administrators on a note executed to them, the defendant can maintain cross-petition against one of them individually, to recover the value of the property for which the note was executed, and which had been converted by him. *Phillips v. Keifer*, 2 Met. 478.

(6) Cross-petition is not allowed against plaintiff alone or jointly with another person. *Grimes v. Grimes*, 88 Ky. 20.

§ 97. Proceedings upon counter-claims, cross-petitions, set-offs—caption. 1. The provisions of section ninety, concerning the demand and giving of relief, apply to set-offs, counter-claims, and cross-petitions.

2. No summons is required upon a set-off or counter-claim against a plaintiff.

3 [127, 129] Proceedings upon cross-petitions, and upon set-offs and counter-claims against new parties, shall be the same as those upon petitions; but they shall not delay the trial of any issue in the original action, or upon a set-off or counter-claim, concerning which a judgment can be rendered without prejudice to the rights of the defendants to the cross-petition, or to the rights of new parties to a set-off or counter-claim.

4. A defendant shall not have judgment upon a set-off or counter-claim, unless the caption of the answer contain the words, answer and set-off, or the words, answer and counter-claim; but a misdescription in the caption, of the nature of the defendant's claims, shall not prevent him from having judgment; nor shall a plaintiff have judgment upon a counter-claim unless the caption of his reply contain the words, reply and counter-claim.

(7) **Summons on.** Summons is necessary upon a cross-petition by a defendant against a co-defendant. *Horine v. Moore*, 14 B. M. 311. And upon cross-petition against new parties. *Peak v. Percifull*, 3 Bush 218; see sec. 692 concerning cross-petition by holder of lien note; and *Jenkins v. Smith*, 4 Met. 380; *Cavin v. Williams*, 8 Bush 343.

(8) The rule requiring service of process does not apply to a suit in chancery by one distributee against an administrator and co-distributee; or one legatee against his co-legatees and the executor, for ascertaining and distributing a fiducial fund in which they have a common interest; and in such cases it is not necessary that the answer shall be made a cross-petition against the co-defendants. *Sale v. Crutchfield*, 8 Bush 636.

(9) In an action by A against B and others for the recovery and partition of land owned by A and B, and claimed adversely by the defendants other than B, B was held entitled to relief against

his co-defendants without service of process or making his answer a cross-petition against them. 8 Bush 636.

(10) A bound himself to assume all the liabilities of B, one of the firm of B and C; in an action by one of the creditors of the firm against firm and A, to which several other creditors of the firm were made defendants, it was held that the creditors who were made defendants and asserted their claims were not entitled to judgment against A, because they failed to have process served on him. *Francis v. Smith*, 1 Duv. 121.

§ 97. Statement in caption—waiver. By replying to answer and counter-claim, and joining issue thereon, the plaintiff waived the right to object to the pleading, because it was not designated in the caption as an answer and counter-claim; if there had been no reply, and judgment had gone by default, judgment would have been erroneous. *Cason v. Cason*, 79 Ky. 558; *Nutter v. Johnson*, 80 Ky. 426; *Lacey v. Lacey*, 95 Ky. 110.

CHAPTER V.

REPLY AND ADDITIONAL PLEADINGS.

§ 98. Reply may contain—what.

§ 99. Rejoinder may contain—what.

§ 100. Surrejoinders and subsequent pleadings.

§ 101. Departure in pleading forbidden—exception.

§ 96 [122, 123] **Reply may contain—what.** A reply may contain—

1. A traverse.

2. A statement of facts which constitute an estoppel against, or avoidance of, a set-off, counter-claim or defense stated in the answer.

§ 98 (1) **Answer—cured by.** A defect in the answer may be cured by an averment in the reply. *Mitchell v. Ashby*, 78 Ky. 254.

(2) **Contributory neglect.** Plea of is admitted by failure to reply. *White v. L. & N. R. R. Co.*, 15 R. 49; but defendant may, by failing to raise question in proper time and manner, waive his right to judgment because of failure to file reply. *L. & N. R. R. Co. v. Copas*, 95 Ky. 460.

(3) **Denial in—sufficiency of.** Reply to a set-off, denying generally the correctness of each and every item, is not a sufficient traverse of the items in the set-off. *Whitaker v. Sandifer*, 1 Duv. 261; *Thruston v. Oldham*, 6 Bush 16; and see note 10.

(4) **Denial of any knowledge or information as to whether or not the various items mentioned in the account pleaded as a set-off, and alleged to have been sold and delivered to plaintiff, were delivered, is not good; there should be a specific denial.** *Wing v. Dugan*, 8 Bush 583.

(5) The petition alleged that the debt was unpaid, with a statement as to how it was created. The denial in the answer that anything was due, and an allegation of payment, made an issue. *Robinson v. Williamson*, 7 Bush 604.

(6) In an action against a vender to recover damages for failing to convey land and deliver possession, the defendant by counter-claim sought a specific execution of the contract. The plaintiff could not in his reply demand a rescission, the reply being restricted to matters of defense. *Spalding v. Alexander*, 6 Bush 160.

(7) **No consideration—reply is necessary to plea of.** *Brown v. Ready*, 14 R. 583.

(8) **Non est factum—reply is not necessary to plea of.** *Brown v. Ready*, 14 R. 583.

(9) **Pleading—practice.** Matters of defense alleged in a petition to be made a party, such petition being taken as an answer, need not be denied by reply. *Graves v. Ward*, 2 Duv. 301.

(10) Every material affirmative allegation in an answer should be replied to (sec. 126) and an issue formed as to each cause of controversy. Sec. 114.

(11) If reply contain matter inconsistent with the petition, the defendant should object to the filing of it, or move to strike out the inconsistent matter, or else the objection is waived. *Barbaroux v. Barker*, 4 Met. 47; sec. 101; sec. 113-4.

(12) If the matter alleged in the answer as constituting a counter-claim involve only a denial of what is averred in the petition, or an affirmation of what is therein denied, no reply is necessary. *Davis v. Dycus*, 7 Bush 4; 11 Bush 228.

(13) While a reply can not contain a set-off against a set-off set up in the answer, a defense that the goods for which it was sought to recover in the set-off were sold in payment of an account due plaintiff, can be pleaded in the reply. *Williams v. Jones*, 1 Bush 621.

(14) Where a reply is treated by the lower court and parties as an amended petition, it will be so regarded by the Court of Appeals. *Ruffner v. Ridley*, 81 Ky. 165.

3. A counter-claim against a set-off.

4. A cross-petition. (*Forms of, pages 622, 623; when not allowed, sec. 112.*)

§ 99. Rejoinder may contain — what. A rejoinder may contain—

1. A traverse.

2. A statement of facts which constitute an estoppel against, or avoidance of—

a. Facts stated in the reply in support of the plaintiff's original cause of action.

b. A defense stated in the reply to a set-off or counter-claim.

c. A counter-claim stated in the reply. (*Forms of, pages 624; when not allowed, sec. 112.*)

§ 100. Surrejoinders and subsequent pleadings. Surrejoinders and subsequent pleadings may be of the same character as replies and rejoinders.

§ 101. Departure in pleading forbidden — exception. A party shall not, in a reply or subsequent pleading, depart from a cause of action or a ground of defense, stated by him in a previous pleading; but the pleading of equitable matter of avoidance or estoppel, in an ordinary action, or of legal matter of avoidance or estoppel in an equitable action, shall not, of itself, constitute such departure. (*When inconsistent allegations allowed, sec. 113.*)

CHAPTER VI.

TIME OF PLEADING.

§ 102. Defense—when to be filed.

§ 103. Ordinary action—time to plead.

§ 104. Equitable action—time to answer.

§ 105. Equitable action—time to complete pleadings.

§ 106. Equitable action—time to complete pleadings.

§ 107. Time to plead extended.

§ 108. Filing in vacation—notice—effect.

§ 109. Filing demurrer in vacation—curing defect—waiver.

§ 102 [87, 135, 137] Defense — when to be filed. Defense to an ordinary action must be filed on the day on which the case is set for trial;

(15) Although a plaintiff can not in his reply depart from his cause of action, he may rely upon matters of avoidance or estoppel. *Gibson v. Black*, 10 R. 373.

§ 101. Construction of section. The words "subsequent pleading" refer to a

pleading subsequent in its character to a reply—as a rejoinder—and not to amended answer, although it may be filed subsequent to the reply. *Bedford v. Graves*, 8 R. 262; and see note 15 to section 98.

§ 102. Non-resident defendant, as to time

and, to an equitable action, on the third day of term, if the summons be served in the county in which the action is brought ten days, or elsewhere in the State twenty days, or out of the State sixty days, before the commencement of the term, or if the defendant be constructively summoned thirty days before the commencement of the term. (*When defendant constructively summoned may file defense, sec. 408; time of trial in ordinary actions, secs. 359, 363.*)

§ 103 ^[136] **Ordinary action—time to plead.** In an ordinary action, all other pleadings must be filed on or before the calling of the case for trial.

§ 104 ^[138] **Equitable action—time to answer.** If the summons in an equitable action be served before the commencement of the term, but not the length of time mentioned in section one hundred and two, the defense shall be filed in thirty days after the service.

§ 105 ^[139] **Equitable action—time to complete pleadings.** In an equitable action, if the answer be due and be filed on the third day of the term, the reply shall be filed within three days thereafter, and the subsequent pleadings shall be filed within three days after the filing of the reply. (*Time of trial, secs. 360, 364 to 367.*)

§ 106. **Equitable action—time to complete pleading.** In an equitable action, if the answer be not due and filed on the third day of the term, the reply shall be filed within ten days after notice of the filing of the answer, and the subsequent pleadings shall be filed within ten days after notice of the filing of the reply.

§ 107 ^[140] **Time to plead extended.** The court may, for good cause shown, and at the cost of the party applying therefor, extend the time for filing a pleading, but not beyond the next succeeding term.

§ 108 ^[141] **Filing in vacation—notice—effect.** The filing of an answer or subsequent pleading in the clerk's office, during vacation, within the time allowed, with notice thereof to the adverse party, or his attorney, shall be equivalent to a filing in court.

§ 109. **Filing demurrer in vacation—curing defect—waiver.** 1. A party who files an answer or subsequent pleading, during vacation, may file a demurrer therewith.

2. The adverse party may, during that vacation, and after

when action against stands for trial. See *Harris v. Adams*, 2 Duv. 141; sec. 60, and note thereto.

§ 107. **Time to file answer.** On motion for continuance and time to file answer

the affidavit should disclose the nature of the defense so that the court may judge whether or not it is sufficient. *Engleman v. National Bank*, 3 Bush 165.

notice to the party filing the demurrer, or his attorney, file an amended pleading to cure any defect suggested by the demurrer.

3. The failure of a party, who so files a special demurrer, to present it for consideration, at the next succeeding term of the court, shall be a waiver of any defect stated in the demurrer, except that to the jurisdiction of the court of the subject of the action.

CHAPTER VII.

GENERAL RULES OF PLEADING.

- § 110. Caption of pleading—what it shall state.
- § 111. Pleading that may be made cross-petition, set-off, counter-claim.
- § 112. Reply and additional pleading—when not allowed.
- § 113. General provisions concerning pleadings.
- § 114. Material issue to be formed.
- § 115. Written in English language and signed—exception.
- § 116. Verification—when not required.
- § 117. Verification—by whom to be made.
- § 118. Special demurrer may be presented by pleading—waiver.
- § 119. Facts that need not be stated—private statute.
- § 120. Writing on which action founded to be filed.
- § 121. Irrelevant or redundant matter stricken out.
- § 122. Judgment—how pleaded.
- § 123. Libel or slander—unnecessary allegations.
- § 124. Slander or libel—what answer may state.
- § 125. Land—requisites of pleadings in action for—burden of proof—costs.
- § 126. Allegations not denied admitted—exception.
- § 127. Material allegation defined.
- § 128. Writings relied on as evidence may be filed—when part of record.

§ 110 [115, 125] **Caption of pleading—what it shall state.** 1. The caption of a pleading must state the name of the court in which the action is brought or pending, and the names of the parties, designating who are plaintiffs and who are defendants, coupled with a word, or short phrase, describing the character of the pleading, with this exception: If there be several parties on either side, a statement of the name of the plaintiff, or defendant, first named in the petition, followed by the phrase, "etc.," shall suffice, except in petitions, cross-petitions and answers which make new parties to a set-off or counter-claim.

2. Petitions in ordinary actions shall be described by the word, "petition;" those in other actions shall be described by the words, "petition in equity." (*See sec. 97.*)

§ 111. **Pleading that may be made cross-petition—set-off—counter-claim.** 1. No pleading, except an answer to an original petition, or the plaintiff's reply to such answer, shall be made a cross-petition.

2. No pleading, except an answer to an original petition, shall present a set-off.

3. No pleading, except an answer to an original petition, or a reply to a set-off, shall present a counter-claim. (*These pleadings defined, sec. 96; proceedings upon, sec. 97.*)

§ 112. **Reply and additional pleading—when not allowed.** There shall be no reply, nor additional pleading, except to affirmative allegations of an adverse pleading. (*What these pleadings may contain, sec. 98 to 101.*)

§ 113 ^[124] **General provisions concerning pleadings.** 1. A party may demur to part of a pleading, and present an issue of fact as to another part.

2 ^[125] A pleading may contain statements of as many causes of action, legal or equitable, and of as many matters of estoppel and of avoidance, legal or equitable, total or partial; and may make as many traverses; and may present as many demurrers, as there may be grounds for in behalf of the pleader.

3 ^[126, 127] If there be more than one, each must be distinctly stated in a separate, numbered paragraph; and either, which is intended to respond to part only of an adverse pleading, must show to what

§ 113. (1) **Alternative pleas.** In action on renewal note, if defense of *non est factum* is made, plaintiff may, by amendment, ask, if plea is good, to have judgment on original note. *First National Bank v. Gains*, 87 Ky. 597.

(2) **Construction of subdivision two.** This subdivision does not imply that a defendant may demur generally to the petition, and, if demurrer is overruled, file an answer denying jurisdiction of court. *McDowell v. C., O. & S. W. R. R. Co.*, 90 Ky. 340.

(3) **Defenses allowed.** In an action for negligence against a railroad company, the defendant has a right under the Code to traverse the petition, plead contributory negligence and a compromise. *Jones v. L. & N. R. R. Co.*, 82 Ky. 610; *Buford v. L. & N. R. R. Co.*, 82 Ky. 286.

(4) **Demurrer to part of pleading.** A defense insufficiently pleaded in the same

paragraph with a defense which is well pleaded may be demurred to. *Williams v. Langford*, 15 B. M. 566.

(5) **Inconsistent pleas.** Plaintiff may, by an amended petition, abandon the cause of action set up in his petition, and present a cause that could not have been joined with that relied on in the petition. *Hord v. Chandler*, 13 B. M. 403. And an objection to a pleading because it contains inconsistent matter can not be made by demurrer. *Ib.* See *Hancock v. Johnson*, 1 Met. 242.

(6) In an action by the assignee of a bankrupt to recover certain notes assigned by the bankrupt a short time before his bankruptcy, the petition charged that the bankrupt had fraudulently assigned them; that he was at the time insolvent, and that they were assigned to prefer a creditor. Held not inconsistent pleas, as it is in effect alleged that plaintiff does

part it is responsive. It is the duty of the court, upon or without motion, to enforce these provisions; and, for that purpose, to dismiss an action without prejudice, or to strike a pleading, or any part thereof, from the case, or to allow a new pleading.

4. If, however, a party file a pleading which contains inconsistent statements, or statements inconsistent with those of a pleading previously filed by him in the action, he shall, upon or without motion, be required to elect which of them shall be stricken from his pleading. But a party may allege, alternatively, the existence of one or another fact, if he state that one of them is true, and that he does not know which of them is true.

5. If a pleading be stricken from the record, re-formed or amended, the party in fault shall pay the cost resulting therefrom.

6. An express admission of a fact is not necessary to render valid a pleading in avoidance or estoppel thereof.

7 (135) A traverse is a denial, by a party, of facts alleged in an adverse pleading, if they be presumptively within his knowledge; or a denial of them, or a denial that he has sufficient knowledge or information to form a belief concerning them, if they be not presumptively within his knowledge. (*Allegations not denied admitted, sec. 126.*)

8. Sham pleadings shall, upon or without motion, be stricken out by the court, at the cost of the parties for whom they are filed and of their attorneys. (*What is not departure in pleading, sec. 101; cause of action may be dismissed without prejudice, sec. 371.*)

not know which is true. *Beatty v. Dudley*, 80 Ky. 381.

(7) In an action by an assignee upon a note, the defendant pleaded as a set-off a note due to him by the assignor. The plaintiff replied that the defendant executed the note sued on to enable the assignor to raise money, and for that purpose it was assigned to him. Held that the reply was supplemental to, and not inconsistent with, the petition. *Barbaroux v. Barker*, 4 Met. 47.

(8) If a reply contain matter inconsistent with the petition, the defendant should object to its being filed, or move to strike out the inconsistent matter. 4 Met. 47.

(9) When the petition shows that several paragraphs relate to the same cause of action, the plaintiff should be required

to elect to prosecute one of the paragraphs, and the others should be stricken out; unless the plaintiff shall allege that the fact, as stated in one or the other of the paragraphs, is true, but he does not know which of them is true. *M. & C. Turnpike Co. v. Maupin*, 79 Ky. 101.

(10) The defendant in an action for slander can not plead inconsistent defenses, as in one paragraph admitting and in another denying the speaking of the words. *Rooney v. Tierney*, 82 Ky. 253. Under the Code of 1854 inconsistent defenses could be pleaded in slander. *Harper v. Harper*, 10 Bush 447.

(11) **Paragraphing — waiver.** The fact that distinct defenses are not set out in separate paragraphs is not cause of demurrer, but of a motion to paragraph. *Mullikin v. Mullikin*, 15 R. 609; *Will-*

§ 114. **Material issue to be formed.** Parties must, before trial, form a material issue concerning each cause of controversy; and it is the duty of the court, upon or without motion, to compel them to do so; and, for that purpose, they may be required to re-form their pleadings, or the pleading of a party who is in fault may be stricken from the case.

§ 115 [142] **Written in English language and signed—exception.** Pleadings must be in the English language, and as concise as possible consistently with clearness; and, excepting those mentioned in section seven hundred and five, must be in writing, and be signed by the parties who file them, or by their attorneys.

§ 116 [143, 145, 535] **Verification—when not required.** Every pleading, which this Code requires to be written, must be verified by an affidavit to the effect that the affiant believes that the statements of the pleading are true, excepting (*Forms of verification, page 627*)—

1. Demurrers.

2. Defensive pleadings filed by a guardian *ad litem*, curator or committee of a defendant who is under disability, or by an attorney for a defendant who has been constructively summoned and has not appeared to the action.

iams v. Langford, 15 B. M. 566. And an objection to a pleading because not properly paragraphed is waived by answering. Noel v. Hudson, 13 B. M. 205.

(12) **Redundancy.** If a petition contain irrelevant or redundant matter, but does not present two causes of action, a motion to strike out (sec. 121) or to make more specific (sec. 134) is the way to reach the defect. Bonney v. Reardon, 6 Bush 34.

(13) **Traverse necessary.** In action against carrier for damages to stock transported over its line, denial of knowledge or information as to its negligence is not sufficient, it must make a specific denial. N., C. & St. L. R. R. v. Carrico, 95 Ky. 489.

(14) See further notes to section 95 as to necessity for and sufficiency of traverse.

(15) **Two or more obligations sued on.** Each should be set out in a separate paragraph although the same parties are on each instrument, but where the obligations sued on are for the performance of a public duty running through several terms and the plaintiff is unable to state

amount of defalcation for each term separately, it is sufficient to set out in paragraphs the obligations and state at conclusion amount of defalcation. Com. v. Tate, 89 Ky. 608.

§ 115. (1) **Signing pleadings.** The answer of the defendant was not signed at the end of it, as it should have been; the signature of the attorney on the back below the indorsement is not a signing in the meaning of the Code; but the court, having permitted it to be filed over the objection of plaintiff, should not have disregarded it on the hearing because not signed. Ashbrook v. Roberts, 82 Ky. 298; see sec. 732-7.

(2) Failure to properly sign a pleading must be taken advantage of by rule, or the objection will be waived. Voorheis v. Eiting, 15 R. 161.

§ 116. (1) **Verification.** In an action against a defendant for creating a private nuisance, the petition need not be verified. Ray v. Sellers, 1 Duv. 254; see further, 138, as to waiver of objection for want of verification.

3. A pleading which states a cause of action that is founded on a written contract, or upon a written indorsement or assignment thereof, if it be filed with the pleading.

4. A pleading which states a defense that is founded on a writing executed by the adverse party, and filed with the pleading.

5. Allegations concerning value or damage, not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise, to pay such value or damage.

6. Pleadings in actions brought in the name of the Commonwealth, pursuant to Chapter XIII, of Title X.

7. When the admission of an allegation of a pleading might subject a party to a criminal or penal prosecution. (*Verification not required in actions for alimony, or divorce, sec. 421; nor in actions for division of land, sec. 499; waiver of, sec. 138; when amendments allowed without, sec. 139; how and before whom made, secs. 551, 549.*)

§ 117 [142, 143] **Verification—by whom to be made.** Pleadings, the verification of which is required by this Code, must be verified as follows:

1. Pleadings of the Commonwealth must be verified by the attorney who brings the action, or by the officer or agent who is authorized by law to have it brought.

2. That of a county, or of a municipal or private corporation, must be verified by its chief officer or agent upon whom a summons in the action is lawfully served, or might be lawfully served if it were a defendant; or if it have no such officer or agent residing in the county in which the action is brought, or is pending, it may be verified by its attorney.

3. That of any other party must be verified by him, with these exceptions:

(2) Plea of *non est factum* must be verified. Ky. Stat., sec. 473; as must plea of no consideration. Ky. Stat., sec. 472.

(3) Objection for want of verification should be made by rule requiring party to verify, and upon his failure to do so, pleading should be stricken from record. *Wheeler v. Wales*, 3 Bush 225.

§ 117. (1) **Verification.** It may now be regarded as settled that the oaths of the plaintiff and the defendant to the respective pleadings are equivalents, leaving the issue to be adjudicated upon the evidence. *Worley v. Tuggle*, 4 Bush 168; *Enders v. Williams*, 1 Met. 346; 17 B. M. 642; 16 B. M. 174.

(2) Suit by county. County judge is proper person to verify petition, but if he refuse, county attorney may verify, and if he refuse, some person authorized to order institution of action may verify. *Estill Co. v. Richmond R. R. Co.*, 91 Ky. 349.

(3) Several parties united in interest must each verify pleading when affidavit mentioned in subsection 4 is filed, and the pleading will be treated as a nullity as to those refusing to verify; but failure of one to verify does not authorize court to treat pleading as a nullity as to those who do. *Harrison v. Lebanon Water Works*, 91 Ky. 255.

a. If he be absent from the county, or mentally incapable of taking an oath, or physically unable to attend before an officer, it may be verified by his agent or attorney.

b. If it be a joint pleading of several parties, who are united in interest, it may be verified by either of them.

c. If the party be under disability, excepting coverture, or infancy and coverture combined, it may be verified by the person who is authorized to file it.

4. But, on motion of a party who files his affidavit, stating his belief that an adverse party, whose pleading has been verified by a person other than himself, knows that a statement thereof, in the affidavit mentioned, is untrue, and that the motion is not made for delay, the court, if such statement be material, shall require such adverse party to verify the pleading; and, if he fail to do so, within a reasonable time, shall treat it, with regard to him, as if it had not been filed.

5. Verification of a pleading does not make other or greater proof necessary on the side of the adverse party than would have been necessary if the pleading had not been verified. (*How and before whom made, secs. 551, 549; when by agent or attorney, sec. 550; form of affidavit to require party to verify in person, page 628.*)

§ 118 [122] **Special demurrer may be presented by pleading—waiver.** A party may, by an answer or other proper pleading, make any of the objections mentioned in section ninety-two, the existence of which

§ 118. (1) **Defect of parties—how reached.** If defect of parties appear in petition it should be taken advantage of by special demurrer, as provided in sec. 92-4; if defect does not appear, it must be taken advantage of by answer, or the error is waived. *McAlister v. Saving Bank*, 80 Ky. 684; *Albro v. Lawson*, 17 B. M. 642; 10 Bush 763; 3 Bush 200; 14 B. M. 246; 4 Met. 385.

(2) **Garnishee may show.** A garnishee may show by affidavit that there is a defect of parties. *Forepaugh v. Appold*, 17 B. M. 625.

(3) **Jurisdiction—appearance.** When the court has no jurisdiction of the subject matter consent can not give it. *Fidler v. Hall*, 2 Met. 461; *Barton v. Barton*, 80 Ky. 212; 18 B. M. 259.

(4) When the court has jurisdiction of the subject matter, the objection for

want of jurisdiction over the person may be waived by consent. *Hughes v. Hardesty*, 13 Bush 364; *Barton v. Barton*, 80 Ky. 212. Defense to the merits of an action is waiver of the right to object for want of jurisdiction over the person of defendant. *Baker v. L. & N. R. R. Co.*, 4 Bush 619.

(5) See further as to what steps a defendant may take without entering his appearance, and when his appearance is entered, note 7 sec. 93.

(6) **Non-residents.** The provision that a defect of parties appearing in petition is waived by failure to demur applies to actions against persons constructively summoned. *Gill v. Johnson*, 1 Met. 649.

(7) **Practice.** Where the fact that plaintiff has not legal capacity to sue is relied upon in the answer and proved on the trial, the plaintiff can not have judg-

is not shown by the pleading of his adversary; and failure so to do is a waiver of any of said objections, except that to the jurisdiction of the court of the subject of the action. (*See further as to special demurrer, sec. 92.*)

§ 119 [144] **Facts that need not be stated—private statute.** 1. Neither the evidence relied on by a party, nor presumptions of law, nor facts of which judicial notice is taken, excepting private statutes, shall be stated in a pleading.

2. In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law.

§ 120 [145] **Writing on which action founded to be filed.** If an action, counter-claim, set-off or cross-petition be founded on a note, bond, bill or other writing, as evidence of indebtedness, it must be filed as a

ment even if defendant fail to insist upon the defect by motion. *Petty v. Malier*, 14 B. M. 246.

(8) When the answer discloses a defect of parties, the action should not be dismissed or abated, but an order entered requiring the additional parties to be made on pain of dismissal without prejudice, and the action postponed until necessary parties are made. *Carpenter v. Miles*, 17 B. M. 598; 3 Met. 133.

§ 119. (1) **Judicial notice.** The courts take judicial notice of all acts and resolutions of the General Assembly. Kentucky Statutes, secs. 1624, 1625. As to what facts judicial notice is taken of, see *Newman's Pleading and Practice*, pages 268 to 277; and as to presumptions of law, see *ibid.* pages 277 to 281; *Gregory v. McFarland*, 1 Duv. 59, *Williams v. Gordon*, 11 Bush 693.

(2) **Private statutes.** As to what are private statutes in the meaning of this section, see *City of Cov. v. Voskotter*, 80 Ky. 219; *City of Cov. v. Hoadley*, 83 Ky. 444. The Court of Appeals will take judicial notice of private acts when they have been relied on in the lower court, although that fact is not formally stated in the bill of exceptions. *Lackey v. R. & L. T. P. Co.*, 17 B. M. 43; *Bixler v. Parker*, 8 Bush 166.

(3) In pleading a private statute it is necessary to state its title and the day on which it became a law. *Zable v. Lou. Baptist Home*, 92 Ky. 89.

(7)

(4) To authorize a corporation created by statute to sue, it is not necessary that it should aver its regular organization; and in general, where a defendant deals with a corporation and recognizes its existence, he is not permitted to raise the question whether it has been legally organized or not. *H. & N. R. R. Co. v. Leavell*, 16 B. M. 358; *Lail v. Mt. Sterling Coal Co.*, 13 Bush 32.

§ 120. (1) **Exhibit filed which contradicts averments of pleading must control.** *Ky. Mut. Co. v. Logan*, 90 Ky. 364; *Boyd v. Bethel*, 10 R. 470; in *Green v. Page*, 80 Ky. 368, it is held that an exhibit neither aids nor destroys the material averments in a pleading, and is not to be considered in determining its sufficiency.

(2) **Pleading.** A petition founded on a writing or bond ought to state the substance of it, or at least so much of it as is material to the action, and also refer to it as a part of the petition, or state why it is not filed. *Collins v. Blackburn*, 14 B. M. 252; and a petition founded on a writing which merely refers to it without setting out its terms is bad on demurrer. *Riggs v. Malthby*, 2 Met. 88; *Dodd v. King*, 1 Met. 430; *Huffaker v. Nat. Bank*, 12 Bush 287.

(3) A writing upon which an action is founded must be filed with and referred to in the petition, and so much of it set forth as will show that the plaintiff by reason of alleged acts or omissions on his part, and on the part of the defendant, is

part of the pleading, if in the power of the party to produce it; and if not filed, the reason for the failure must be stated in the pleading; if upon an account, a copy thereof must be filed with the pleading. (*Action on lost writing, sec. 7; other writings may be filed as evidence, sec. 128; when read as genuine, sec. 527; meaning of "writing," sec. 732.*)

§ 121 ^[149] **Irrelevant or redundant matter stricken out.** Irrelevant or redundant matter in a pleading shall be stricken out, upon or without motion, at the cost of the party whose pleading contains it.

§ 122 ^[148] **Judgment—how pleaded.** In pleading a judgment or determination of a court or officer, it is not necessary to state the facts conferring jurisdiction; but it shall be sufficient to state that the judgment or determination was duly given or made.

entitled to relief. *Hill v. Barrett*, 14 B. M. 83.

(4) **Record—writing filed part of.** Notes sued on and filed with the petition constitute part of the record. *Dodd v. King*, 1 Met. 430; *Totten v. Cooke*, 2 Met. 275; *Harmon v. Wilson*, 1 Duv. 322.

(5) An account not filed with and as part of the petition, but simply lodged in the papers before appearance or answer, is not part of the record, and need not be noticed in the answer. *Webb v. Jeffries*, 2 Bush 221.

(6) In an action against a common carrier to recover the value of baggage lost, a schedule filed with the petition and made part thereof is a part of the case, and the jury had a right to regard the statements of fact it contained as admissions upon the part of the plaintiff. *L., C. & L. R. R. Co. v. Mahan*, 8 Bush 184.

(7) **Rule to file—practice.** If a writing which is the evidence of the indebtedness or liability constituting the cause of action be not filed, the adverse party may ask a rule to have it filed, and upon failure to file it, or to offer a sufficient reason for not so doing, may have action dismissed; but if he fail to take steps requiring it to be filed, and judgment is rendered on the pleading, it can not be reversed because the writing was not filed. *Preston v. Roberts*, 12 Bush 570.

(8) A rule to file title papers, or papers of any kind where they are not referred

to in the pleadings, is unauthorized except upon sufficient grounds made out by affidavit showing that the filing of the papers is necessary to the substantial ends of justice. *Ruggles v. Moore*, 18 B. M. 821; and see *Marion Nat. Bank v. Abell*, 88 Ky. 428, for a full statement of practice regarding production of books and documents.

(9) **Writing—to be filed—waiver.** Although a writing upon which action is founded is not filed, the adverse party can not complain of it after judgment. *McGhee v. Sutherland*, 84 Ky. 198; 12 Bush 570.

§ 121. **Redundant matter.** It is too late after verdict to object on account of redundant matter in the petition, or that blanks were not filled. *E. & P. R. R. Co. v. Pottinger*, 10 Bush 185. Nor is it reversible error to refuse to strike out redundant matter unless it appears that the party was prejudiced thereby. *Buckles v. Lambert*, 4 Met. 330; and see *Bonney v. Reardin*, 6 Bush 34.

§ 122. (1) **Administrator—appointment of, how pleaded.** The allegation in the petition, that appellees were by an order of the Hardin County Court appointed administrators of A. S. Gardner, deceased, and qualified as such, is a substantial compliance with section 122 of the Civil Code. *Warfield v. Gardner*, 79 Ky. 583.

(2) **Bankruptcy—pleading discharge.** In pleading discharge in bankruptcy, it is not necessary to allege that the court granting the discharge had jurisdiction.

§ 123 ^[150] **Libel or slander—unnecessary allegations.** In an action for libel or slander, it is not necessary to state any extrinsic facts for the purpose of showing the application to the plaintiff of the alleged defamatory matter.

§ 124 ^[151] **Slander or libel—what answer may state.** In the actions mentioned in section one hundred and twenty-three, the defendant may state the truth of the alleged libel or slander, and any mitigating circumstances; and, whether he prove the justification or not, he may prove the mitigating circumstances to reduce the amount of damages.

§ 125 ^[152] **Land—pleadings in action for—burden of proof—costs.** 1. A petition for the recovery of land, or for its subjection to a demand of the plaintiff, must describe it so that it may be identified.

or to state the facts conferring jurisdiction; but it is necessary to state in substance that discharge was duly granted. *Laidley v. Cummings*, 83 Ky. 606.

(3) **Foreign judgment.** In action on foreign judgment it is necessary to allege facts showing that the court rendering the judgment had jurisdiction of the subject matter and the person of the defendant. *Gebhard v. Garnier*, 12 Bush 321; *Wood v. Wood*, 78 Ky. 624; 10 Bush 160; 12 Bush 274.

(4) **Judgment.** In pleading judgment it is not necessary to state facts conferring jurisdiction, and this rule applies to all judgments of superior courts, whether the facts necessary to give jurisdiction are general or special. *Garner v. Wills*, 92 Ky. 386.

§ 123. (1) **Slander—libel.** Causes of action for may be joined. *Hargan v. Purdy*, 93 Ky. 424.

(2) **Defamatory words either spoken or written of a person in respect to his office or employment are actionable.** *Hargan v. Purdy*, 93 Ky. 424.

(3) **Words charging one with having accepted a bribe to abandon a contest for an office are not actionable.** *Field v. Colson*, 93 Ky. 347.

(4) **Any defamatory words calculated to degrade or injure the reputation of a person in society, when written and published, are libelous and actionable.** *Allen v. Wortham*, 89 Ky. 485; as to what words are slanderous see *Lemon v. Wells*, 78 Ky. 117.

(5) See, for a full discussion of the law of newspaper libel, *Riley v. Lee*, 88 Ky. 603.

(6) **Privileged communications—**see *Stewart v. Hall*, 83 Ky. 375; *Nix v. Caldwell*, 81 Ky. 293; *Morgan v. Booth*, 13 Bush 480; *Campbell v. Bannister*, 79 Ky. 205.

§ 124. (1) **Inconsistent defenses.** The defendant can not plead inconsistent defenses in slander suit, as in one paragraph admitting and in another denying the speaking of the words. *Rooney v. Tierney*, 82 Ky. 253. Sec. 113-4 inhibits inconsistent pleas.

(2) **Mitigating circumstances.** As to pleading mitigating circumstances, see *Campbell v. Bannister*, 79 Ky. 205; *Morgan v. Booth*, 13 Bush 480; *Nix v. Caldwell*, 81 Ky. 293; 10 Bush 448; 83 Ky. 375; *McIntyre v. Bransford*, 13 R. 454.

(3) **Pleading—evidence.** When the only answer is a denial of the speaking of the words, nothing is admissible in evidence which tends either to prove the truth of the charge or to establish a defense on the ground that they were spoken on a justifiable occasion. A plea of justification must admit the truth of the words spoken. *Harper v. Harper*, 10 Bush 448.

(4) **A denial of knowledge or information as to speaking the words charged to be slanderous is not sufficient, a positive denial must be made.** *Macauley v. Elrod*, 16 R. 291.

§ 125. (1) **Pleading.** In action to recover land in possession of defendant it

2. In an action for the recovery of land, the answer of the defendant must state whether or not he claims it, or any part of it; and, if he claim part of it, his answer must so describe such part that it may be identified. The making of such statement, or of such statement and description, shall not, of itself, throw on the defendant the burthen of proving his right to the land claimed by him; but, if the plaintiff recover any part thereof, the defendant shall pay the costs of the action.

§ 126 ^[185] **Allegations not denied admitted—exception.** Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed, excepting these, which must be proved though not traversed:

1. Allegations of a petition, or cross-petition, against a defendant who is under any disability except coverture.

2. Allegations of an answer, or reply, so far as it states a set-off or counter-claim against a new party who is under any disability except coverture.

is only necessary that he shall deny title in plaintiff; it is not necessary to set up title in himself. *Simms v. Simms*, 88 Ky. 642.

(2) Petition for recovery of land must so describe it that it may be identified, and defendant, by asserting claim to the land, does not assume burden of proving it. *Howard v. Lock*, 15 R. 154; *Owensboro R. R. v. Barker*, 15 R. 175.

(3) Answer of defendant, failing to allege that land claimed by him is any part of land described in petition, is defective. *Bailey v. McConnell*, 12 R. 473.

§ 126. (1) **Assessment of recovery—when necessary.** It was held under Code of 1854 that in an action to recover the value of coal converted to defendant's use, *Daniel v. Judy*, 14 B. M. 393; or on an attachment bond, *Burgess v. Jacob*, 14 B. M. 517; or for trespass on plaintiff's land, *Clark v. Seaton*, 189 B. M. 226; or against a common carrier for failing to deliver goods of an alleged value, *Huston v. Peters*, 1 Met. 558; or on an obligation to pay a sum of money in cash notes, *Marr v. Prather*, 3 Met. 196; or for the value of clothing for a negro which defendant failed to furnish according to contract, *Skillman v. Muir*, 4 Met. 282;

or for failing to deliver according to contract whisky alleged to be worth so much per gallon, *Beam v. Hayden*, 5 Bush 426; or in proceeding to recover reasonable attorney fee, *Wintersmith v. Tabor*, 5 Bush 105; or for damages for an assault and battery, *Slone v. Slone*, 2 Met. 339; or for the conversion of a wagon and horses, 1 Bush 189; or for failure to permit defendant to perform labor which he had contracted to render, *Wood v. Morgan*, 6 Bush 507, that judgment by default was improper, and that the value or damage should have been assessed. But that Code provided that "allegations of value or of amount of damage shall not be considered as true by the failure to controvert them," while this section provides that every allegation of value or amount of damage which is accompanied by "an allegation of an express promise, or by a statement of facts showing an implied promise to pay such value or damage," must be considered as true unless denied. *Ragsdale v. Lander*, 80 Ky. 61.

(2) Under this Code a recovery without proof may be had either in actions, in contract, or tort, where there is either an express or an implied promise to pay

3. Allegations against a defendant constructively summoned, who has not appeared in the action.

4. Allegations concerning value or amount of damage, not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise, to pay such value or damage; such allegations, so accompanied, need not be proved unless traversed. (*Traverse defined, sec. 113; judgment upon failure to plead, sec. 379; trial by court, sec. 312; by jury, sec. 313; petition for divorce not taken as true by failure to answer, sec. 422.*)

the amount sought to be recovered. *Harris v. Mertz*, 82 Ky. 200; 80 Ky. 61; and see sec. 379 as to manner of assessment when it is necessary.

(3) In an action to recover for use and occupation of land where the petition stated facts raising an implied promise to pay, its allegations could be taken as true unless traversed. 80 Ky. 61.

(4) It was held even under Code of 1854 that in an action on a medical account, or for goods sold and delivered, the averments of petition would be taken as true if not traversed. *Harris v. Ray*, 15 B. M. 628; *Mills v. Brown*, 2 Met. 404.

(5) **Assessment of recovery without evidence.** In an action for assault and battery the jury have a right, in the absence of answer and proof, to render a judgment for more than nominal damages. *Rogers v. Aulick*, 2 Duv. 419.

In an action to recover for the services of a negro boy for one year, the law and facts were submitted to the court, and without hearing proof the judge assessed the amount of the recovery. The court say "that in an action of assumpsit for work and labor, the jury have a right, in the absence of all proof of the value of such labor, and from their own knowledge, to find a verdict for the price of such labor, and the court has same power when case is submitted to it." *Baum v. Winston*, 3 Met. 127. And see further sec. 379.

(6) **Interrogatory — failure to answer.** Judgment can not be given against a defendant because he failed to answer an interrogatory propounded in the petition, when the material allegations thereof are denied. *Burnett v. Garnett*, 18 B. M. 68.

(7) **Interest** should be allowed on cash

advances, not as a matter of discretion in the jury or court, but as legal damages. *Field v. Burnam*, 3 Bush 518; and is allowable on an account as matter of law from the time when it becomes payable. *Henderson Mfg. Co. v. Lowell Machine Shops*, 86 Ky. 668.

(8) **Non-resident.** In an action against a defendant constructively summoned, it is not necessary to prove the execution of the note sued on. *Gill v. Johnson*, 1 Met. 649; *Ball v. Poore*, 81 Ky. 26.

(9) **Payment—plea of by one of several obligors.** In an action against several obligors on a note, a plea of payment by one presents a defense for all, and there can be no judgment against those not answering until plea is disposed of. *Rouse v. Howard*, 1 Duv. 31.

(10) **Practice.** In an action for the conversion of property the defendant failed to answer, and a judgment was rendered *pro confesso* except as to the allegation of the value of the property, that being tried at a subsequent term by a jury. The judgment *pro confesso* concluded all the litigation except as to value. *Kendrick v. Fields*, 2 Bush 153.

(11) An order taking a petition in equity for confessed should not be made before the process is served upon all the defendants concerned in interest. *Alexander v. Quigley*, 2 Duv. 399. See secs. 366, 367, as to trial of equity actions.

(12) The provisions that allegations of value or amount of damage can not be taken as true by failure to answer them applies to equitable as well as ordinary actions. *Clark v. Seaton*, 18 B. M. 226.

(13) Failure to deny part of a paragraph of an answer which is good entitles defendant to judgment without evi-

§ 127 ^[154] **Material allegation defined.** A material allegation is one which is necessary for the statement or support of a cause of action or defense.

§ 128 ^[155] **Writings relied on as evidence may be filed—when part of record.**
1. In addition to the writings which a party is required by section one hundred and twenty to file as the foundation of his action or defense, he may file, as an exhibit, with his pleading, or with leave of court at any time pending the action, any writing upon which he may intend to rely as evidence.

2. In an equitable action, such exhibits shall constitute part of the record, unless it show that they were not used on the trial.

3. In an ordinary action, such exhibits shall not constitute part of the record, unless it show that they were used on the trial.
(*Meaning of "writing," sec. 732; when read as genuine, sec. 527.*)

CHAPTER VIII.

MISTAKES IN PLEADINGS—AMENDMENTS.

- § 129. Variance when material—amendment.
- § 130. Immaterial variance—practice—amendment.
- § 131. Variance when fatal—action on contract.
- § 132. Amendment before answer—notice.
- § 133. Demurrer overruled, party may plead.
- § 134. Amendments generally—trivial error.
- § 135. Supplemental pleading—action to enforce lien.
- § 136. Continuance on amendment.
- § 137. Verification of petition before trial sufficient.
- § 138. Verification not necessary after trial begins.
- § 139. Verification—amendment allowed without.

§ 129 ^[156] **Variance when material—amendment.** No variance between pleadings and proof is material, which does not mislead a party, to

dence, although part of paragraph may be bad. *Gray v. Garrison*, 2 R. 218.

(14) **Averments against persons under disability when taken as true although not proved.** See *Finzer v. Nevin*, 13 R. 773; where it is held that provision of Code requiring proof is for protection of person under disability.

(15) **Record—what it should show.** If the record shows that a judgment in an action for tort or damages was rendered by default, it can not be sustained. Had the record recited that the case had been "heard," or anything to show that there was any proof, the court would presume

that the circuit judge heard testimony. *Dehoney v. Sandford*, 2 Bush 169; *Mead v. Nevill*, 2 Duv. 280; *Marrs v. Prather*, 3 Met. 196; *Smith v. Curtis*, 1 Duv. 281; *Gould v. Bonds*, 1 Bush 189; 14 B. M. 393; 18 B. M. 227; 5 Bush 426.

(16) **Traverse—what is sufficient.** See notes to sec. 95.

§ 128. **Change in section.** This section is materially different from sec. 155 of Code of 1854. For cases construing sec. 155, see *Harman v. Wilson*, 1 Duv. 322; *Haney v. Tempest*, 3 Met. 95; *Vaughn v. Mills*, 18 B. M. 633; *Ruggles v. Moore*, 18 B. M. 821.

§ 129. (1) **Material variance.** Where

his prejudice, in maintaining his action or defense upon the merits. A party who claims to have been so misled must show that fact to the satisfaction of the court; and, thereupon, the court may order the pleading to be amended, upon such terms as may be just.

§ 130 [187] **Immaterial variance—practice—amendment.** If such variance be not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment.

petition alleged that certain property was purchased from defendant and proof showed that it was a purchase of double the amount from defendant and another the variance is fatal. *Gray v. Garrison*, 2 R. 218.

(2) Judgment can not be rendered against a defendant as an individual when the petition shows that he executed the obligation sued on in his fiducial capacity as administrator. *Lusk v. Anderson*, 1 Met. 426.

(3) Plaintiff instituted suit upon a note executed by the defendant to another person, and alleged that the note had been executed to himself; it had not been assigned to plaintiff. Held that the variance was fatal, and plaintiff could not recover. *Dodd v. King*, 1 Met. 430.

(3) **Negligence.** The allegation of willful negligence necessarily includes all inferior grades, and, upon failing to establish his right to punitive damages, plaintiff may recover compensatory damages, if the defendant is a railroad company and the person injured was not at the time an employee. *L. & L. R. R. Co. v. Case*; 9 Bush 728; *Claxton v. L. & B. S. R. R. Co.*, 13 Bush 636. And a general allegation that injury was caused by negligence and carelessness of defendant is sufficient. *Chiles v. Drake*, 2 Met. 146.

(4) **Negligence—where plaintiff specifies the character of negligence he relies on he can not recover by showing a different state of negligence.** *McCain v. L. & N. R. R. Co.*, 13 R. 809; nor can he prove a different state of negligence from

that set out in petition. *Greer v. L. & N. R. R. Co.*, 94 Ky. 169.

(5) **Practice.** The proper mode to take advantage of a variance between allegation and proof is a motion to instruct the jury as in case of a non-suit. *Mitcherson v. Grays*, 4 B. M. 400.

(6) In an action against the city for work and labor done on its streets at its instance, the petition averred the performance of the work, but failed to state such facts as would make the city liable. After the proof was heard and the jury instructed to find for defendant, plaintiff offered an amended petition stating facts sufficient to hold city liable. Held that the plaintiff should have been allowed to file the amendment. *Kearney v. City of Cov.*, 1 Met. 339; and see sec. 130.

(7) **Variance—not material.** If the variance between the answer and proof is not such as to mislead the plaintiff in maintaining his action, and does not affect his substantial rights, it will not be ground for reversal. If the variance is material, the attention of the court should be called to it, and an effort made to have pleadings corrected. *Woodcock v. Farrell*, 1 Met. 437; and see sec. 130.

(8) In an action upon a writing purporting to be an unconditional guaranty, but which did not express the consideration upon which it was executed, the averments of the petition as to the consideration showed that the contract was conditional, depending for validity upon the performance of certain acts by the promisee. Held that there was no variance between the contract sued on and

§ 131 ^[188] **Variance when fatal—action on contract.** If, however, the allegation of the claim or defense, to which the proof is directed, be unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

[In an action on a contract alleged to have been made by several defendants, in the event the evidence shall show the contract to have been made with less than all those defendants by whom it is alleged to have been made, this shall not be deemed either a variance or failure of proof, but judgment may be rendered against the party or parties shown to be bound and in favor of those shown not to be bound.] (*Words in brackets added by act of 1888.*)

§ 132 ^[189] **Amendment before answer—notice.** The plaintiff may, at any time before answer, amend his petition without leave; but, unless

the allegation of the petition. *Steadman v. Guthrie*, 4 Met. 147.

(9) In an action to recover for services alleged to have been performed in 1863, proof that they were performed in 1864 is not a material variance. *Gentry v. Doolin*, 1 Bush 1.

(10) A bill of exchange payable in "current exchange" was declared on as a bill for money. Held that the variance was immaterial. *Morrison v. Tate*, 1 Met. 569.

(11) In a suit by a surety against a co-surety, to recover money paid for their principal, the petition failed to allege the insolvency of the principal, and no proof of his insolvency could be admitted. *Bolling v. Doneghy*, 1 Duv. 220.

(12) The allegation in the petition that the note sued on was executed and delivered to the plaintiffs, being admitted by failure to deny it, the variance between the petition and note in the name of one of the plaintiffs was waived, being immaterial. *Anderson v. Rogers*, 1 Bush 200.

§ 131. (1) **Failure of proof—what is.** In *Gossom v. Badgett*, 6 Bush 97, it was held that in an action against two upon an alleged joint undertaking, a judgment against one upon proof that the contract was made alone with him could not be sustained. But see now amendment to this section.

(2) In an action against one, the evidence disclosed that the defendant made the contracts sued on as a member of a firm, and for the firm. Held that a judgment against him was proper. *Waits v. McClure*, 10 Bush 763.

§ 132. (1) **Amendment—notice of filing.** One day's notice is only required where the plaintiff amends his petition without leave, and less than five days before term. When the amendment is made by leave of court, and in presence of defendant, no notice is necessary. *Hunt v. Semonin*, 79 Ky. 270.

(2) **New cause of action—summons necessary.** Summons is necessary on an amended petition which states a new cause of action (*Cecil v. Sowards*, 10 Bush 96), although it is filed after summons has been executed on petition, and before answer. *Rutledge v. Vanmeter*, 8 Bush 354; and see note 1 to sec. 40.

(3) If amendment does not present a new or distinct cause of action, summons is not necessary. *Joyes v. Hamilton*, 10 Bush 544; *L. & L. R. R. Co. v. Case*, 9 Bush 728.

(4) Where the original petition sought to make defendant liable as indorser of a bill, and an amended petition charged him with the conversion of the bill, the amendment set up a new cause of action. So, if A should institute an action against B upon a note alleged to have been exe-

the amendment be filed five days before the term at which the defendant is summoned to answer, he shall give to the defendant notice, of one day, of his intention to amend. (*May be filed in vacation to cure defect, sec. 109.*)

§ 133 [100] **Demurrer overruled, party may plead.** Upon a demurrer being overruled, the party demurring may file an answer, reply or additional pleading.

§ 134 [101] **Amendments generally—trivial error.** The court may, at any time, in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended, by adding or striking out the name of a party; or, by correcting a mistake in

cuted for goods sold and delivered, and it appeared B was not liable on the note, if A should file an amended petition upon an account for the same goods, it would present a new cause of action. *Hyatt v. Bank of Ky.*, 8 Bush 193.

(5) In an action to sell land owned by infants summons on petition was properly executed, afterward an amended petition was filed asking the sale of town lots owned by them also. Summons on amended petition was necessary. *Howard v. Singleton*, 15 R. 309.

(6) **Practice.** The plaintiff has a right to file an amended petition before answer filed, and the court has no judicial discretion to reject it. *Champion v. Robertson*, 4 Bush, 17; but after answer is filed leave of court must be obtained to file an amended petition. *Mount v. L. & N. R. R.*, 2 R. 221; and see further sec. 134 and notes thereto.

§ 134. (1) **Amendments — departure.** In an action by a ward against her guardian, to recover on an assignment of a note, an amended petition alleging that the guardian had failed to account for money in his hands was a departure, and should not have been allowed; but, if filed, plaintiff should have been required to elect which action she would prosecute. *Humphrey v. Hughes*, 79 Ky. 487.

(2) **Appeal from inferior to circuit court.** On an appeal to the circuit court the defendant has a right to make all the defenses he has, and the court may allow the defense to be changed or new defenses to be made, as if the case had

been originally brought in that court. *Willis v. McNeal*, 8 R. 411.

(3) The plaintiff in justice's court filed an affidavit showing defendant's indebtedness to him in the sum of \$50, and obtained an attachment; no petition was filed. On an appeal to the circuit court, the plaintiff was allowed to file an amended petition setting up his cause of action. *Puff v. Hatcher*, 78 Ky. 146. Section 705 requires pleadings, when amount is over \$50, to be in writing.

(4) **Attachments.** As to amendment of petition, or affidavit for, see sec. 208 and notes thereto.

(5) **Demurrer.** When a demurrer to the petition is sustained after answer filed and at a subsequent term of the court, the right to amend is the same that it would have been at the appearance term had a demurrer then been sustained. *Williams v. Gordon*, 11 Bush 693; pleading may be amended after demurrer; sec. 134.

(6) **Discretion of court.** The only limitation upon the discretion of the court in allowing amended pleadings is, that they must be in furtherance of justice, and must not change substantially the claim or defense. A demurrer having been sustained to the petition, the court did not abuse its discretion in allowing an amended petition to be filed, although an answer and reply had been filed. *Greer v. City of Cov.*, 83 Ky. 410.

(7) An amended answer denying a fact admitted by mistake in the original answer should be permitted to be filed.

the name of a party, or a mistake in any other respect; or, by inserting other allegations material to the case; or, if the amendment do not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And, if a proceeding taken by a party fail to conform in any respect to the provisions of this Code, the court may permit an amendment of such proceeding, so as to make it conformable thereto. And, if the allegations of a

The allowance or rejection of an amendment is not usually a cause for reversal, unless there has been a manifest abuse of the discretion of the court. *Downing v. Bacon*, 7 Bush 680.

(8) **During trial.** In an action against a city for work done at its instance, the petition alleged the performance of the work and presented a cause of action. The proof was that the work was done under a special contract, by which plaintiff was to look to the lot owners for payment. The court instructed the jury to find for defendant, after which, but before verdict was rendered, plaintiff offered an amended petition alleging facts sufficient to render city liable on special contract. Held that the amendment should have been permitted to be filed. *Kearney v. City of Cov.*, 1 Met. 339.

(9) The chancellor may, even after the trial is commenced, permit the pleadings to be amended when it is apparent that the ends of justice require it. *Rogers v. Rogers*. 15 B. M. 364.

(10) In an action upon a note the defendant alleged that it contained \$160 usurious interest; the plaintiff by reply admitted that the note contained \$36 usury. During the trial the plaintiff was permitted, upon the vague statement of a witness that there was no usury in the note, to file an amendment denying that it embraced any usury. Held that it was error to allow the amendment. *Hubble v. Murphy*, 1 Duv. 278.

(11) After the issues are made up and the cause ready for hearing, it is not an abuse of discretion to refuse to permit an amendment pleading the statute of limitation to be filed. *Yocum v. Foreman*, 14 Bush 494; *Donnelly v. Pepper*, 91 Ky. 363.

(12) When an amended answer conforms to the proof and does not substantially change the defense, and the filing of it is in furtherance of justice, it is not error to set aside submission and permit it to be filed. *Nat. Mutual Association v. Jones*, 84 Ky. 110; and the court may permit an amendment filed after jury is sworn. *Wade v. Moore*, 3 R. 392.

(13) **Duty of court.** If the court permits a defective pleading to be filed over the objection of the adverse party, the court should in some way notify the party of the defect, and give him an opportunity to correct it, before disregarding it on the final hearing because of such defect. *Ashbrook v. Roberts*, 82 Ky. 298.

(14) **Judgment.** After final judgment it is too late for either party to file amendments. *Meadows v. Goff*, 90 Ky. 540; *Brown v. Vancleave*, 86 Ky. 381.

(15) Proceedings upon an amended petition filed after judgment are nullities. *Brown v. Vancleave*, 86 Ky. 381.

(16) After a petition has been dismissed an amended petition can not be filed at the next term of the court, as there is no petition in court to amend, and even if it be considered as an original petition, if it sets up same matter as was contained in original petition, the judgment dismissing first petition is a bar. *Houston v. Kidwell*, 12 R. 386.

(17) **Misnomer** in name of defendant may be corrected by amendment, and when mistake in name is discovered after cause of action is barred, defendant who has answered will not be allowed to rely on plea of limitation. *Heckman v. L. & N. R. R.*, 85 Ky. 631.

(18) When sued by the wrong name, the defendant must disclose his true

pleading be so indefinite or uncertain that the precise nature of the claim or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. The court must, in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. (*Party in fault must pay cost of, sec. 113; amendment of affidavit for attachment, sec. 268.*)

name in making objection to the misnomer by plea in abatement or otherwise. *L. & N. R. R. Co. v. Hall*, 12 Bush 131.

(19) **Practice.** An amended petition not noted of record, but treated by the parties as filed, and certified by the clerk as part of the record, will be regarded as part of it. *Bowler v. Lane*, 3 Met. 312; and where a reply was treated by parties and lower court as an amendment to the petition it will be so regarded by Court of Appeals. *Ruffner v. Ridley*, 81 Ky. 165.

(20) The court should not permit an amended answer to be filed over the objection of the adverse party when it presents no defense. *Patrick v. Swinney*, 5 Bush 421.

(21) In an action on an alleged contract to pay \$50 annually for the use of a bridge, the testimony established, not an express, but an implied, contract to pay the amount, and the court should have permitted plaintiff to amend its petition to enable it to recover on the implied promise if it failed to establish an express agreement to pay. *Frankfort Bridge Co. v. Frankfort*, 18 B. M. 41.

(22) If a petition presents in substance a cause of action, but is defective in form, the remedy is by motion to make more specific, and not by demurrer; and failure to make motion before answer is waiver of objection. *Pugh v. White*, 78 Ky. 210; *Posey v. Green*, 78 Ky. 162; 4 Met. 330.

(23) **Prayer of petition.** Amendment of so as to make it conform to the cause of action set forth in the petition is not a new cause of action. *Durrett v. Stewart*, 88 Ky. 665.

(24) **Rejected pleading made part of record.**

See *McCain v. L. & N. R. R. Co.*, 13 R. 809; and notes to sec. 335.

(25) **Return of case from Court of Appeals.** In an action where there was no answer and no motion to vacate an attachment obtained upon insufficient allegations and reversed by the Court of Appeals, the plaintiff on the return of the case should have leave to amend his petition. *Clark v. Seaton*, 18 B. M. 226. The right to amend after reversal because of defective pleadings is the same as before trial. *Vest v. Norman*, 1 R. 817.

(26) **Time amendment takes effect.** Matter set up in an amended pleading will not relate back to the time of filing the original, so far as the rights of persons not parties to the suit are concerned; and the action as to the matters set up in the amendment will be considered pending as to them, only from the time the amendment is filed. *Hawes v. Orr*, 10 Bush 431.

(27) **Verdict—after.** The court should not, after trial and verdict, set aside the verdict for the purpose of allowing a pleading or an amended pleading to be filed. *Evans v. Stone*, 80 Ky. 78; see *Mount v. Tappey*, 7 Bush 617.

(28) **Waiver of objection.** Failure to object to filing amended answer, or to move to strike it from files, waives objection to it. *Bedford v. Graves*, 8 R. 262.

(29) **Withdrawal of pleading.** A party to an action may, in the discretion of the court, withdraw any pleading filed by him, unless it works an injury to his adversary. *Humphrey v. Hughes*, 79 Ky. 487.

(30) Where one party has the right to avail himself of another's defense the latter can not, over the objection of the former, withdraw that defense after

§ 135 [103] **Supplemental pleading — action to enforce lien.** A party may be allowed, on motion, to file a supplemental pleading, alleging material facts occurring after the filing of the former pleading; but if a plaintiff, having a lien for a debt due and a debt not due upon property which he seeks to subject, state both claims in his petition, he may, upon a suggestion of record that one of them has become due, *pendente lite*, have judgment for a sale of the property therefor.

§ 136 [104] **Continuance on amendment.** If a party amend a pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the adverse party can not be ready for trial in consequence thereof, a continuance may be granted to some day in the same term or to another term of the court.

§ 137 [104] **Verification of petition before trial sufficient.** A petition filed without verification shall not be dismissed for that reason, if the verification be made on or before the calling of the action for trial.

§ 138 [105] **Verification not necessary after trial begins.** No objection shall be taken, after the commencement of the trial, to any pleading for the want of, or a defect in, the verification. (*When trial begins, sec. 590.*)

commencement of trial. *Hearn v. Lander*, 11 Bush 669; nor can a creditor, seeking to set aside a fraudulent conveyance, dismiss his action to the prejudice of other creditors. *Heidrich v. Silva*, 89 Ky. 422; *Baker v. Kinnaird*, 94 Ky. 5; *Roberts v. Phillips*, 11 Bush 11.

§ 135. (1) **Supplemental pleadings.** Where a mortgagee institutes suit to recover possession of mortgaged property before forfeiture, and the forfeiture occurs pending the action, he may by supplemental petition set up the forfeiture. This section applies to ordinary as well as equitable actions. *Brookover v. Hurst*, 1 Met. 665.

(2) The facts which this section allows to be presented in the supplemental petition must be material to the case as presented in the original petition; they must be such as serve to explain or perfect the cause of action originally stated. *Taylor v. Moran*, 4 Met. 127.

(3) The plaintiff in an action for slander can not, by an amended petition, set up slanderous words spoken pending the action as a distinct ground of recovery or to enhance the damages; but may set them up to show the intent with which

the words charged in the original petition were spoken. 4 Met. 127.

(4) A plaintiff who holds lien notes due, and not due, may set up all of them in his petition, and, by suggestion of record, have judgment for notes not due as they mature, but this rule only applies to lien notes, and a supplemental pleading is required as to other notes. *Dant v. Head*, 90 Ky. 255.

(5) In an action upon three lien notes judgment was rendered ordering sale of land to satisfy two of them that were due, afterward the third note fell due, and the former judgment was set aside and judgment rendered directing sale to pay all the notes. Held that the court had power to set aside first judgment after the term, and its action was proper. *Carr v. Watkins*, 10 R. 342.

§ 136. **Continuance on amendment.** When several causes of action are set out, or the same cause is set forth in different paragraphs, the striking out of any of the causes of action or paragraphs is not such an amendment as will authorize a continuance. *Branshaw v. Berry*, 2 R. 58.

§ 138. (1) **Objection — how taken.** Objection to pleading for want of verifica-

§ 139 [100] **Verification—amendments allowed without.** Courts may, in their discretion, permit the amendments authorized by this chapter to be made without being verified, unless a new and distinct cause of action or defense be thereby introduced.

CHAPTER IX.

INTERROGATORIES.

- § 140. Equitable actions in—answers read as deposition.
- § 141. Party answering not confined to mere response.
- § 142. Time to answer—effect of delay on trial.
- § 143. Ordinary actions—when allowed in.
- § 144. Ordinary actions—time to answer.
- § 145. Trial not postponed because of failure to answer.
- § 146. Application of section 141.
- § 147. Answers to distinguish between knowledge and information.
- § 148. Verification of answers—how made.
- § 149. Party—when compelled to appear as witness.
- § 150. Claim or defense when sustained by failure to answer.
- § 151. Court may compel answers—penalty for failure.

§ 140 [10] **Equitable actions in—answers read as deposition.** In equitable actions, a party may annex to his pleading written interrogatories to the adverse party, concerning any material allegation thereof; and answers thereto, on oath, may be read by either party, as a deposition between the party interrogating and the party answering.

§ 141 [100] **Party answering not confined to mere response.** The party answering shall not be confined to responding merely to the interrogatories, but may state any facts concerning the cause of action to which the interrogatories refer, and they may likewise be read as a deposition. (*If answers state new matter; how controverted, sec. 608.*)

tion should be by rule against the party failing to verify it, and upon his failure to have it stricken from the record. *Wheeler v. Wales*, 3 Bush 225; *Harris v. Ray*, 15 B. M. 628.

(2) To take advantage of error in overruling motion to require party to verify his pleading, the decision must be excepted to at the time. *Cobb v. Stewart*, 4 Met. 255; *Mason v. Mason*, 5 Bush 187.

(3) **Waiver.** Right to require plaintiff to verify petition is waived by answer,

and the right can not be regained by withdrawing answer. *Butler v. Church of Conception*, 14 Bush 540; *Meador v. Turpin*, 4 Met. 93.

§ 140. **Interrogatories.** Party answering interrogatories may, on the trial of the action, read his answers as a deposition. *Ecklar v. Galbreath*, 5 Bush 617; *Short v. Tinsley*, 1 Met. 397. But they can not be so read unless authenticated as required by the Code. *Ford v. Thompson*, 1 Met. 580; see *Musick v. Ray*, 3 Met.

§ 142 [169] **Time to answer—effect of delay on trial.** Interrogatories annexed to a petition shall be answered when the party is required to answer the petition; if annexed to any other pleading, they shall be answered in twenty days after notice of the filing thereof shall be given to the adverse party or his attorney; but if answered twenty days before the term at which the action stands regularly for trial, the action shall not be postponed on account of their not being sooner answered. (*When party interrogated can not demand trial, sec. 365.*)

§ 143 [170] **Ordinary actions—when allowed in.** In ordinary actions, a party may annex to his pleading written interrogatories to an adverse party concerning any material allegation—

1. If the party interrogated do not reside within twenty miles from the place where the action may be pending.

2. If the party interrogated be unable to attend court on account of infirmity or imprisonment, or be a female.

§ 144 [171] **Ordinary actions—time to answer.** In ordinary actions, interrogatories annexed to the petition shall be answered when the petition is required to be answered; if annexed to any other pleading, they shall be answered at or before the calling of the cause for trial, if the party interrogated had reasonable notice of their being filed.

§ 145 [172] **Trial not postponed because of failure to answer.** The trial of an ordinary action shall not be postponed on account of the failure to answer the interrogatories, if the party interrogated be present in court at the trial, so that he may be orally examined; nor, in case of his absence, without an affidavit showing the facts which the party believes will be proved by the answers thereto, and that the party has not filed the interrogatories, nor omitted to file them, for the purpose of delay; nor, if the party will consent that the facts stated in the affidavit shall be considered as admitted by him.

§ 146 [173] **Application of section 141.** The provisions of section one hundred and forty-one shall apply to the answers to interrogatories in ordinary actions. (*If answers state new matter; how controverted, sec. 609.*)

§ 147 [174] **Answers to distinguish between knowledge and information.** A party, in answering such interrogatories, shall distinguish clearly between what is stated from his personal knowledge and what is stated from information or belief merely. An unqualified statement of a fact shall be considered as made from his personal knowledge.

428. Defendant is not bound to answer interrogatory contained in body of petition nor unless annexed to it. *Burnett v. Garnett*, 18 B. M. 68; *McCrae v. Gun-*

ter, 14 R. 5; nor to answer any question which would subject him to criminal or penal prosecution. *Cole v. Wilson*, 18 B. M. 212.

§ 148 [176] **Verification of answers—how made.** Answers to such interrogatories shall be verified by the affidavit of the party answering, to the effect that the statements in them made of his personal knowledge are true, and those made from the information of others he believes to be true.

§ 149 [176] **Party—when compelled to appear as witness.** If a party reside within twenty miles from the place in which the action may be pending, he may be summoned by the adverse party, and be compelled to testify on the trial of an ordinary action as any other witness.

§ 150 [177] **Claim or defense when sustained by failure to answer.** If a party, filing interrogatories, file an affidavit that he verily believes that any subject of the interrogatories is in the personal knowledge of the adverse party, and that his answers thereto, if truly made, will sustain the affiant's claim or defense, or any part thereof, and the adverse party shall fail, after reasonable time, to answer them, the claim or defense, or the part thereof mentioned in such affidavit, shall be deemed to be sustained.

§ 151 [178] **Court may compel answers—penalty for failure.** The court may compel answers to interrogatories by process of contempt, and may, on the failure of the party to answer them, after reasonable time, dismiss the petition, or strike out the pleading, of a party so failing. (*In action on constructive service court may propound, sec. 412.*)

TITLE VIII.

PROVISIONAL REMEDIES.

- CHAPTER I. ARREST AND BAIL, 152.
 II. CLAIM AND DELIVERY OF PERSONAL PROPERTY, 180.
 III. ATTACHMENT, 194.
 IV. INJUNCTION, 271.
 V. RECEIVERS, 298.
 VI. DEPOSIT IN COURT, 303.

CHAPTER I.

ARREST AND BAIL.

- ARTICLE 1. ORDER OF ARREST—WHEN AND HOW OBTAINED, 152.
 2. PROCEEDINGS UPON AN ORDER OF ARREST, 157.
 3. LIABILITY AND DISCHARGE OF BAIL AND OF OFFICER, 169.
 4. MOTION TO VACATE AN ORDER OF ARREST, 177.

ARTICLE 1.

ORDER OF ARREST—WHEN AND HOW OBTAINED.

- § 152. Defendant in civil action—how arrested.
 § 153. Order of arrest—grounds of—who may issue.
 § 154. Bond to be executed before order issues.
 § 155. Order of arrest—requisites of.
 § 156. Return day of order.

§ 152 [179] **Defendant in civil action—how arrested.** A defendant in a civil action can be arrested and held to bail, only upon the conditions and in the manner prescribed in this chapter.

§ 153 [180] **Order of arrest—grounds of—who may issue.** An order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought or pending, at its commencement, or at any time before judgment, if an affidavit of the plaintiff be filed in his office showing—

1. The nature of the plaintiff's claim.
2. That it is just.

§ 153. (1) **Affidavit indispensable.** The affidavit is made an indispensable prerequisite for the order of arrest; without it the clerk has no authority to make the order, and the arrest and taking bail bond from the defendant before affidavit filed is unauthorized. *Pauer v. Simon*, 6 Bush 514.

(2) **Arrest—insufficient grounds for.** The plaintiff filed his affidavit showing that defendant owed him \$450, and obtained an order for his arrest on the ground that he was about to depart from the State, without leaving enough property therein to satisfy plaintiff's claim. It was proved on the trial that defendant was

3. The sum or value which the affiant believes the plaintiff ought to recover.

4. That the affiant believes, either that the defendant is about to depart from this State, and, with intent to defraud his creditors, has concealed, or moved from this State, his property, or so much thereof that the process of the court after judgment can not be executed; or that the defendant has money, or securities for money, or evidences of debt, in the possession of himself, or of others for his use, and is about to depart from this State without leaving property therein sufficient to satisfy the plaintiff's claim. (*Form of affidavit, page 629. How and before whom made, secs. 551, 549. When by agent or attorney, sec. 550. How order obtained before debt is due, secs. 237 to 242; when may issue on holiday, sec. 665.*)

§ 154 [1881] **Bond to be executed before order issues.** The order of arrest shall not be issued by the clerk until a bond is executed in his office, with good sureties, to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the arrest, if the order be wrongfully obtained, not exceeding double the amount of the plaintiff's claim stated in the affidavit. (*Form of bond, page 629. If defective, new one may be executed, sec. 682. Sureties may be sworn; qualification of, secs. 683, 684.*)

§ 155 [1881] **Order of arrest—requisites of.** The order of arrest shall be addressed and delivered, with a copy thereof, to the sheriff. It shall state the names of the parties to the action, the court in which the action is brought or pending, and the amount of the plaintiff's claim specified in the affidavit; and shall require the sheriff to arrest the defendant, and hold him to bail in the sum of the plaintiff's claim, with the probable costs of the action, not exceeding twenty-five dollars, and to make return of the order on a day to be named therein, with the bail bond, if any be taken. (*Form of order, page 630. Must indorse time of reception, sec. 674; order may be addressed and delivered to other officer, or person, secs. 667, 668.*)

§ 156 [1881] **Return day of order.** The return day of the order of arrest, if issued at the commencement of the action, shall be the same as that of a summons; if issued afterward, it may be another day in term, at the option of the plaintiff. (*When summons returnable, sec. 44.*)

about to leave the State, and that he had, at the time the order of arrest was issued, cash notes amounting to about \$20,000 on deposit in a Richmond bank, and that he owned turnpike stock of the value of \$1 000. The court say:

(8)

"Whether the evidences of debts deposited in the bank should be regarded as *property* within the meaning of the Code, we are satisfied the turnpike stock should be; and as it was amply sufficient to satisfy plaintiff's claim, the order of

ARTICLE 2.

PROCEEDINGS UPON AN ORDER OF ARREST.

- § 157. Order—how executed.
- § 158. Defendant committed to jail unless bailed—how discharged.
- § 159. Deposit of money in lieu of bail.
- § 160. Sheriff to pay into court money deposited.
- § 161. Court to make orders for its keeping and disposition.
- § 162. Sheriff liable for money deposited.
- § 163. Bail of defendant—requisites and effect of bond.
- § 164. Qualifications of bail.
- § 165. Objection by plaintiff to sufficiency of bail.
- § 166. Officer exonerated from liability—when.
- § 167. Proceedings if bail adjudged insufficient.
- § 168. Insolvent debtor's oath—defendant may take.

§ 157 ^[1864] **How order executed.** The sheriff shall execute the order of arrest by arresting the defendant and delivering to him a copy thereof. (*When may execute on holiday, sec. 665. May break doors to execute, sec. 676. When defendant privileged from arrest, sec. 666.*)

§ 158 ^[1865] **Defendant to be committed to jail unless bailed—how discharged.** The defendant, when arrested, shall be committed by the sheriff to the jail of his county, a copy of the order of arrest being delivered to the jailer; and, unless bailed, shall be kept in custody in the manner provided by law in the case of a defendant taken in execution upon a judgment in a civil action, until discharged in the mode and upon the conditions applying to such defendant. (*Mode of discharge, see Ky. Stat., sec. 2180.*)

§ 159 ^[1866] **May deposit money in lieu of bail.** The defendant may, before or after giving bail, deposit in the hands of the sheriff, or in court, the sum of money mentioned in the order of arrest; whereupon, he shall be discharged, or his bail, if any be given, shall be released.

§ 160 ^[1867] **Sheriff to pay into court money received by him.** The sheriff shall pay into the court the money received by him in vacation, in lieu of bail, on the first day of the next term. If it be received during a term, he shall pay it into the court immediately.

arrest was properly vacated." *Curtis Field v. Montmollin*, 5 Bush 455.

(3) An intention of a resident of this State to leave the State temporarily on business, or even on a visit, to return within a reasonable time, will not authorize an order of arrest. *Myall v. Wright*, 2 Bush 130.

§ 157. **Officer—duty of to execute order.** A reasonable discharge of the duties of the office at all times and during all hours is a responsibility attached to the office of sheriff; and it was held that a sheriff was liable in an action for damages for refusing to execute in the night time an order of arrest, he being informed at the

§ 161 [188] **Court to make orders for its keeping and disposition.** The court shall make proper orders for the safe-keeping of money deposited in lieu of bail. It may direct the sheriff to keep the money, and, after judgment in the action, shall order it to be paid to the party entitled thereto, according to the result.

§ 162 [189] **Sheriff liable for money deposited.** Money deposited in the hands of the sheriff, in lieu of bail, or directed by the court to be kept by him, shall be held upon his official responsibility; and he and his sureties shall be liable, and may be proceeded against, for any default in relation thereto, as in other cases of delinquency.

§ 163 [190] **Bail of defendant—requisites and effect of bond.** Bail may be given by the defendant on his arrest, or at any time afterward before judgment, upon giving bond with good surety to the plaintiff, in the presence of the sheriff, or of the jailer if the defendant have been committed to jail, to the effect that, if judgment shall be rendered in the action against the defendant, he will render himself amenable to the process of the court thereupon. The bond, when accepted, shall be returned to the clerk's office, and the defendant shall be discharged. (*Form of bond, page 630; if defective new one may be executed, sec. 682.*)

§ 164 [191] **Qualifications of bail.** The bail must be a resident of this State, and be worth double the sum specified in the order of arrest, beyond the amount of his debts, and have property in this State, subject to execution, at least equal in value to that sum. If two or more become bail, they must, in the aggregate, possess those qualifications. The bail, if so required by the sheriff, shall make affidavit of their qualification before him.

§ 165 [192] **Objections by plaintiff to sufficiency of bail.** Objection to bail, for insufficiency, may be made in court, during the term at which the bail bond is returned, and not afterward, unless the bond be returned within the last three days of the term; in which case, the motion may be made on the first day of the succeeding term. The motion can not be made without notice thereof to the officer who accepted the bond. And if the notice be adjudged unreasonable, the court may continue the motion to some day in the same or the next succeeding term.

time it was delivered to him that the next morning would be too late. *Phillips v. Ronald*, 3 Bush 244.

§ 162. **Sureties of officer—liability of.** The sureties of a sheriff who has received money in lieu of bail are responsible, first, when the sheriff has failed to account for the money to the court: and second-

when the court directs the sheriff to keep it. They are not responsible when the court directs the sheriff to loan out the money, if, having done so, he fails to make the required report concerning it. *Sanders v. Parrott*, 1 Duv. 292.

§ 163. (1) **Bail bond.** It was held in *Shuttleworth v. Levi*, 13 Bush 195, that

§ 166 [193] **Officer exonerated from liability—when.** If the motion be not made, or the bail be not thereupon adjudged insufficient, the officer shall be exonerated from liability by reason of the insufficiency of the bail.

§ 167 [194] **Proceedings if bail adjudged insufficient.** Judgment that bail is insufficient shall not release them, but an order shall forthwith be made to rearrest the defendant; and, thereupon, the same proceedings may be had, and with the like effect, as are directed upon an order of arrest.

§ 168 [195] **Insolvent debtor's oath—defendant may take.** Upon judgments in actions in which the defendant has been arrested and held to bail, and in which the order of arrest has not been vacated, an execution against the body of the defendant may be issued, upon which the same proceedings shall be had, and the defendant shall be dealt with in the same manner, as is provided by law in the civil actions in which executions may be issued against the body of the defendant; except that the oath of insolvency, upon reasonable notice, may be taken at any time after the arrest, by delivering to the plaintiff, his agent or attorney, a schedule of the property intended to be surrendered, although said schedule may not have been delivered ten days before the taking of such oath. This exception shall also apply to section one hundred and fifty-eight of this Code. (*See Kentucky Statutes, sec. 2180, as to oath of insolvency; form of execution against body of defendant, page 639.*)

ARTICLE 3.

LIABILITY AND DISCHARGE OF BAIL, AND OF OFFICER.

§ 169. Surrender of defendant discharges bail.

§ 170. Bail may arrest or have defendant arrested.

§ 171. Bail—liability how fixed and amount of.

§ 172. Action against bail.

§ 173. Exoneration of bail—what will cause.

§ 174. Officer—when liable as bail.

§ 175. Officer—liability of as bail how fixed.

§ 176. Bail—liability of to officer.

§ 169 [196] **Surrender of defendant discharges bail.** A surrender of the defendant to the sheriff of the county in which he was arrested, with

an unnecessary stipulation in a bond rendered it invalid; but see now Ky. Stats., sec. 4569.

issued before affidavit made is invalid. *Pauer v. Simon*, 6 Bush 514.

(2) Bond taken under an order of arrest

(3) **Requisites of bond.** It is essential to the validity of the bond that it should

a delivery to him of a certified copy of the order of arrest and of the bail bond by the defendant, or by his bail, at any time before the liability of the bail is fixed, shall discharge the bail. The sheriff shall give to the bail a written acknowledgment of the surrender, and commit the defendant to the jail of his county, with his order indorsed upon the copy of the bail bond delivered to the jailer.

§ 170 [197] **Bail may arrest or have defendant arrested.** For the purpose of surrendering the defendant, the bail may, at any time or place, arrest him, or authorize, in writing, indorsed upon a copy of the order of arrest and bail bond, the sheriff or any constable to do so.

§ 171 [198] **Bail—liability how fixed and amount of.** A return of “not found” upon an execution against the body of the defendant, placed in the hands of the sheriff of the county in which he was arrested, within twenty days after it might have issued upon the judgment, shall be necessary to fix the liability of the bail, which shall be to pay the amount of the judgment and costs.

§ 172 [199] **Action against bail.** The bail can be proceeded against in a separate action only.

§ 173 [200] **Exoneration of bail—what will cause.** He will be exonerated by the death of the defendant, or his removal from this State under process of law as a fugitive, before the return-day of the summons served upon the bail in the action to enforce his liability; or by the imprisonment of the defendant in the penitentiary; or his legal discharge from the obligations to render himself amenable to the process of the court; or by his surrender to the sheriff of the county in which

appear to have been executed in the presence of the sheriff or other officer authorized to take bail. *Jones v. Bunn*, 2 Met. 490. But the failure to return bond to clerk's office will not defeat or impair its validity. *Id.*

(4) A bond stipulating that the defendant “will render himself amenable to the court thereupon,” the words “process of” being omitted, is valid. *Abbott v. Daniel*, 3 Met. 340.

§ 174. (1) **Bail—liability of, how fixed.** The law requires that the execution shall be placed in the hands of the officer within twenty days after it might have issued, but does not require that the execution shall be returned within twenty days after judgment, nor within twenty days after it is issued, in order to fix the liability

of the bail. *Allcorn v. Tuggle*, 3 Met. 537.

(2) The liability of the bail, when fixed by this section, shall be to pay the amount of the judgment and costs, without regard to the solvency or insolvency of the principal. *Abbott v. Daniel*, 3 Met. 340.

(3) To fix the liability of the bail, it is indispensable that there should be a valid execution against the body of the defendant; that it should be placed in the hands of the officer within the time prescribed, and be returned not found. An execution commanding the sheriff to take the body of the defendant “to satisfy and pay the Commonwealth of Kentucky the sum of \$125” is insufficient to fix the liability of the bail. It should be

he was arrested in execution thereof, on or before the return-day of the summons in the action against the bail, or within such further time as the court, in which the action is pending, may allow. If the defendant be confined in any jail of this State, the bail will be exonerated by delivering to the jailer thereof, at any time before the return-day of the summons in the action against the bail, a certified copy of the order of arrest and of the bail bond, with a written order thereupon to detain the defendant in custody, until discharged by law from the action in which the bond was given. The jailer shall give a written acknowledgment of the receipt of the order, which shall be filed with the original bond.

§ 174 [301] **Officer—when liable as bail.** If, after being arrested, the defendant, without fault on the part of the sheriff, be rescued, or escape, or bail be not taken or be adjudged insufficient, or a deposit be not made, the sheriff shall be liable as bail, unless he shall have committed the defendant to jail, and obtained a written acknowledgment thereof from the jailer; in which case, the jailer shall be so liable. Either officer may discharge himself from such liability by putting in sufficient bail at any time before judgment.

§ 175 [302] **Officer—liability of as bail how fixed.** The liability of the officer, as bail, shall be fixed in the manner provided in section one hundred and seventy-one, and can be enforced only in a separate action against him, or against him and his sureties in his official bond, as in other cases of delinquency.

§ 176 [303] **Bail—liability of to officer.** Bail, judged insufficient, shall be liable to the officer for the damages he may sustain by reason of such insufficiency.

ARTICLE 4.

MOTION TO VACATE AN ORDER OF ARREST.

§ 177. Application for reduction of bail or vacation of order.

§ 178. Motion supported or opposed by affidavits.

§ 179. Scire facias against bail abolished.

§ 177 [304] **Application for reduction of bail or vacation of order.** A defendant, against whom an order of arrest has been obtained, may, at any

to satisfy and pay the plaintiff in the judgment. *Abbott v. Daniel*, 3 Met. 340.

(4) That execution upon the judgment

against the principal was returned "not found" before the return day thereof does not prejudice the bail. *Jones v. Bunn*, 2 Met. 490.

time before judgment in the action, and before a decision of a motion on account of the insufficiency of the bail, apply to the court, or, in vacation and before executing a bail bond, to the judge thereof, or to any circuit judge, or to the presiding judge of the county court, to vacate the order of arrest, or to reduce the amount of bail. Reasonable notice of the application shall be given to the plaintiff. If satisfied that the bail ought not to have been required, or that the sum for which it was demanded is too large, the court, or judge, may vacate the order of arrest, or reduce the amount of bail. The decision of the motion shall be final in the action, but shall not affect the rights of the parties in any other action. Upon the vacation of the order of arrest, the defendant shall be discharged, or the bail bond, if any be given, shall be canceled. (*Notice may be served on attorney, sec. 631.*)

§ 178 [200] **Motion supported or opposed by affidavits.** If the motion be supported by affidavits or other evidence out of the record, the plaintiff may oppose it by affidavits or other evidence, in addition to that on which the order of arrest was obtained. (*Person on whose affidavit order issued may be examined, sec. 548.*)

§ 179 [200] **Scire facias against bail abolished.** The writ of *scire facias* against bail is abolished.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

- § 180. Plaintiff may claim immediate delivery.
- § 181. Order of delivery—clerk to issue—affidavit for.
- § 182. Value of each article to be stated.
- § 183. Requisites of order—when returnable.
- § 184. Bond to be executed—form of—action on.
- § 185. Bond in action against officer—provisions of.
- § 186. Order—how executed.
- § 187. Disposition of property by officer.
- § 188. Defendant may retain property by executing bond.
- § 189. Appraisement of property by officer.
- § 190. Allowance to officer for keeping property.
- § 191. Proceedings when property claimed by stranger.
- § 192. Order may be issued to any county.
- § 193. Defendant required to discover property.

§ 180 [201] **Plaintiff may claim immediate delivery.** The plaintiff in an action to recover the possession of specific personal property may, at the commencement of the action, or at any time before judgment, claim the immediate delivery thereof, as is herein provided. (*Jury to assess value, sec. 330; form of judgment, sec. 388.*)

§ 181 ^[308] **Order of delivery—clerk to issue—affidavit for.** An order for the delivery of property to the plaintiff shall be made by the clerk, when an affidavit of the plaintiff is filed in his office, showing—

1. A particular description of the property claimed.
2. Its actual value and the damages which the affiant believes the plaintiff ought to recover for the detention thereof.
3. That the plaintiff is the owner of the property, or has a special ownership or interest therein—stating the facts in relation thereto—and that he is entitled to the immediate possession of the property.

§ 181. (1) **Action may be maintained** against person who had the possession of property, although he may not have the possession when suit is brought. *Easley v. Easley*, 18 B. M. 86.

(2) **Demand is not necessary** to maintain action. *Easley v. Easley*, 18 B. M. 86.

(3) **Destruction of property** wrongfully possessed by a defendant in detinue or a plaintiff in replevin pending the action is the loss of the wrongful possessor. *Carrel v. Early*, 4 Bibb 271; *Gentry v. Barnett*, 6 Mon. 115; *Scott v. Hughes*, 9 B. M. 106.

(4) **Fraudulent purchase of goods**—vendor may elect to treat contract as a nullity, and bring an action for the recovery of the property. *Dietz v. Sutcliffe*, 80 Ky. 650.

(5) **Identity of property** sought to be recovered is question of fact for jury, not court, to determine. *Sawyer v. Middlesborough*, 13 R. 550.

(6) **Joint owners** must all join in an action for the recovery of property. *Bush v. Groom*, 9 Bush 675.

(7) **Judgment—form of.** Where the plaintiff was in possession of a stray horse, which he had never posted, and which he had bailed to defendant, the plaintiff was entitled, in an action for the recovery of the horse, to a judgment for the horse, if to be had; if not, for its value. *Borron v. Landes*, 1 Duv. 299.

(8) Judgment should be the alternative for the return of the property, or its value in case a return can not be had, and damages for the taking and withholding of the property. *Rogers v. Bradford*, 8 Bush 163; *Reid v. King*, 89 Ky. 388.

(9) The plaintiff having obtained possession of the property, upon the trial the jury returned a verdict for the defendant. Thereupon the court rendered judgment for a return of the property or for ninety dollars, being the value of the property proved upon trial. The judgment was held erroneous, as the jury should have fixed in their verdict the value of the property, sec. 330. *Young v. Parsons*, 2 Met. 499; 2 Bush 117.

(10) **Owner of property which has been stolen** from him may maintain action for its recovery against purchaser from thief. *Basset v. Green*, 2 Duv. 560.

(11) **Plaintiff can not dismiss his action.** The plaintiff can not, after having obtained possession of the property by the execution of the required bond, dismiss his action, and thereby prevent a judgment; the defendant is entitled to a trial, and if proper, to a judgment for the return of the property and damages for its detention. *Rogers v. Bradford*, 8 Bush 163.

(12) **Pleading.** The defendant from whom a horse had been taken filed an answer claiming to be the owner of the horse, and praying to be dismissed with a judgment for his costs. On the trial the jury found for defendant, fixing the value of the horse at one hundred and twenty-five dollars, and the damages at thirty-five dollars, and judgment was rendered in accordance with the verdict. Held that the answer was sufficient, and that defendant was entitled under it to the judgment rendered. *Bates v. Buchanan*, 2 Bush 117.

(13) **Right to maintain action.** The absolute property and right to immediate

4. That the property is wrongfully detained by the defendant.

5. That it has not been taken for a tax or fine against the plaintiff, or under any order or judgment of a court against him; nor seized under an execution, distress-warrant, or attachment against his property; or, if so seized, that it is, by statute, exempt from such seizure.

6. That the plaintiff's cause of action has accrued within one year. If the action be brought to recover property taken under an execution or distress-warrant or attachment, the affidavit must state the fact of the taking and the nature of the process under which it was done. (*Form of affidavit, page 631; how, and before whom, made, secs. 551, 549; when by agent or attorney, sec. 550; when may issue on holiday, sec. 665; trial of, and judgment in action, secs. 330, 388.*)

§ 182 [309] **Value of each article to be stated.** If the delivery of several articles of property be claimed, the affidavit must state the value of each.

§ 183 [310] **Requisites of order—when returnable.** The order for the delivery of the property to the plaintiff shall be addressed and delivered, with a copy thereof, to the sheriff. It shall state the names of the parties to the action, and the court in which it is brought or pending, and direct the sheriff to take the property—describing it, and stating its value, as in the affidavit of the plaintiff—and deliver it to him, and to make return of the order on a day to be named therein. The order shall be made returnable as an order of arrest is directed to be returned. (*Form of order, page 631; order may be addressed and delivered to other officer or person, secs. 667, 668; must indorse time of reception, sec. 674; when returnable, sec. 156.*)

§ 184 [311] **Bond to be executed by plaintiff—form of—action on.** The order shall not be complied with by the sheriff, until there has been executed in his presence, by one or more sufficient sureties of the plaintiff, a bond to the defendant, to the effect that the plaintiff shall duly prosecute the action, and that he shall perform the judgment of the court therein, by returning the property, if a return thereof shall be adjudged, and by paying such sums of money as may be adjudged

possession will enable one to maintain action although he has never had actual possession. *Tunstall v. McClelland*, 1 Bibb 186; *McDowell v. Hall*, 2 Bibb 610; 5 Litt. 254.

§ 184. **Bond—action on.** In an action against B, A obtained an order of de-

livery for a horse, and upon the execution of the bond required by this section the horse was delivered to him. On the trial of the action, C, who claimed to be interested, was made defendant, and a judgment rendered in his favor against A for two hundred and fifty dollars, the

against him in the action, not exceeding double the value of the property and the costs of the action. Any person establishing a claim to the property, pursuant to the provisions of section twenty-nine, shall be entitled to the benefit of the provisions of said bond. (*Form of bond, page 631. If defective, new one may be executed, 682. Sureties may be sworn ; qualifications of, secs. 683, 684.*)

§ 185 [212] **Bond in action against officer—provisions of.** If the action be brought against a sheriff, or other officer, to recover the possession of property taken by him under an attachment or execution against a person other than the plaintiff, or under a distress warrant, the bond provided for in section one hundred and eighty-four shall be to the effect that the plaintiff shall duly prosecute the action, and that he shall perform the judgment of the court therein, by returning the property, if a return thereof shall be adjudged, and by paying to the defendant, or to the plaintiff in the attachment or execution, or party who sued out the distress warrant, as may be directed by the court, such sums of money as may be adjudged against the plaintiff in the action, not exceeding double the value of the property and the costs of the action. (*Form of bond, page 632. Tenant may bring action for delivery against plaintiff in distress warrant, sec. 33.*)

§ 186 [213] **Order—how executed.** The sheriff shall execute the order by taking the property therein mentioned, if it be found in the possession of the defendant or of his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the order was placed in the sheriff's hands. He shall also deliver a copy of the order to the defendant, or to the person from whose possessions the property is taken ; or, if neither can be found, he shall leave it at the usual place of abode of either, with some person of the age of sixteen years or over. (*When may be executed on holiday, sec. 665. May break and enter building to execute, sec. 675.*)

§ 187 [214] **Disposition of property by officer.** If the affidavit of the plaintiff state that the property was taken under an attachment, execution or distress warrant, the sheriff shall deliver it to the plaintiff. In every other case he shall retain the property for two days, unless the bond mentioned in the succeeding section be sooner executed.

§ 188 [215] **Defendant may retain property by executing bond.** Within two days after the taking of the property by the sheriff, the defendant,

value of the horse. Held that B and C, for the benefit of C, could maintain an action on the bond executed by A to B, and recover against the surety in the bond the amount of his judgment against

A. *McGlasson v. Bradford*, 7 Bush 250 ; section 874 of the Code of 1854 mentioned in this opinion is not in this Code.

§ 188. (1) **Bond of defendant—liability on.** Plaintiff having recovered judgment for

or any one for him, may, if the property was not taken under an attachment, execution or distress warrant, cause a bond to be executed to the plaintiff, in the presence of the sheriff, by one or more sufficient sureties, in double the value of the property, to the effect that the defendant shall perform the judgment of the court in the action; whereupon, the sheriff shall restore the property to the defendant, or to the person in whose possession it was found. If such bond be not executed within the time above limited, the sheriff shall deliver the property to the plaintiff. He shall return the bonds with the order. (*Form of bond, page 632; see references under sec. 184.*)

§ 189 [216] **Appraisement of property by officer.** Before taking any bond, upon the suggestion of the plaintiff that the value of the property is not truly stated in the order for its delivery, or upon such suggestion of the defendant, and upon his producing the property to the sheriff, he shall select three disinterested housekeepers to appraise the same, under oath to be administered by him—whose appraisement, indorsed upon the order, shall be regarded as the value of the property, in taking the bond. (*Form of appraisement, page 632.*)

§ 190 [217] **Allowance to officer for keeping property.** The sheriff shall safely keep the property, and shall be allowed by the court the necessary expenses of doing so, to be paid by the plaintiff and taxed in the costs.

§ 191 [218] **Proceedings when property claimed by stranger.** If another person than the defendant or his agent claim the property taken by the sheriff, and deliver to the sheriff his affidavit that he is entitled to the possession thereof, the sheriff shall not be bound to keep it, or deliver it to the plaintiff, unless he shall, within two days after the delivery to him, or to his agent or attorney, by the sheriff, of a copy

the property in controversy, the defendant and his sureties in the bond executed under this section are liable for the costs of the action as well as the value of the property. *Galloway v. Bethume*, 6 Bush 113.

(2) In such case the surety can not be proceeded against by motion, the remedy of the plaintiff is by action on the bond. *Gay v. Morgan*, 4 Bush 606.

(3) **Bond—how construed.** In an action on a note, and to enforce a mortgage given to secure it, an order of delivery was obtained for the possession of the mortgaged property. The defendant executed the bond required by this section.

Upon the trial, judgment was given for the debt and foreclosure of the mortgage; the defendant surrendered the property for which he had given bond, and it did not sell for enough to pay the judgment. In a suit on the bond to recover the balance of the judgment it was held that the obligors were not liable, as the bond was only to satisfy such judgment as might have been rendered on the claim for the delivery of the property. *McKee v. Pope*, 18 B. M. 548.

§ 191. **Claimant—notice by sheriff.** When a sheriff seizes the property of another than the defendant, if such owner is in possession, he is not required

of the affidavit, indemnify the sheriff against the claim, by a bond executed by one or more sufficient sureties, in double the value of the property. No claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless so made. He shall return the affidavit of the claimant, with his proceedings thereon, to the clerk's office. (*Form of bond, page 632; see references under sec. 184.*)

§ 192 ⁽²¹⁰⁾ **Order may be issued to any county.** An order may, at any time before judgment, be directed to any county for the delivery of the property claimed. And several orders may issue at the same time, or successively, at the option of the plaintiff; but only one of them shall be taxed in the costs, unless otherwise ordered by the court.

§ 193 ⁽²¹⁰⁾ **Defendant required to discover property.** If it appear from the affidavit of the plaintiff, or the return of the order of delivery, that the property claimed has been disposed of or concealed so that the order can not be executed, the court may compel the attendance of the defendant, examine him on oath as to the situation of the property, and punish a disobedience of its orders in this respect as in cases of contempt. (*Plaintiff may obtain attachment, sec. 194.*)

to give any notice to the sheriff as to his possession, as provided in this section, in order to secure a right of action against the sheriff. It is only when the claimant is not in possession that notice is required. *Mann v. Martin*, 14 Bush 763.

If the sheriff takes property from one owning it, and in possession, he does it at his peril. The question of the ownership of the property in controversy should be submitted under proper instructions to a jury. *Ib.*

CHAPTER III.

ATTACHMENT.

- ARTICLE 1. GENERAL ATTACHMENTS, 194.
 2. ATTACHMENTS AND ORDER OF ARREST IN CERTAIN ACTIONS, 237.
 3. ATTACHMENTS AGAINST SPECIFIC PROPERTY, 249.
 4. DISCHARGE AND REINSTATEMENT OF ATTACHMENTS, 259.

ARTICLE 1.

GENERAL ATTACHMENTS.

- SUBDIVISION 1. GROUNDS OF ATTACHMENT, 194.
 2. ATTACHMENT—HOW OBTAINED, 196.
 3. EXECUTION AND RETURN OF, 202.
 4. DISPOSITION OF ATTACHED PROPERTY, 218.
 5. PROCEEDINGS UPON ATTACHMENTS, 221.

SUBDIVISION 1.

GROUNDS OF ATTACHMENT.

§ 194. In action for money or property.

§ 195. Rent—attachment for.

§ 194^[221] **In action for money or property.** The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as is provided in section two hundred and twenty-seven, as a security for the satisfaction of such judgment as may be recovered—

First: In an action for the recovery of money against—

1. A defendant, who is a foreign corporation or a non-resident of the State; or,

§ 194. (1) **Attachment before action commenced void.** Attachment can not issue until action commenced. Attachment issued before summons issued, or warning order made, is void. *Hall v. Grogan*, 78 Ky. 11; *Kellar v. Stanley*, 86 Ky. 240. When action commenced, see sec. 39.

(2) **Concealment.** The concealment which will authorize and sustain an attachment under subsection 5 involves the intention of the debtor to delay his creditors, and may be accomplished by secreting himself in his house, or upon his premises, or by departing secretly from his place of abode to a more secure spot either in or out of the county of his

residence. *Dunn v. Salter*, 1 Duv. 342; *Lewis v. Wright*, 3 Bush 811.

(3) **Court in which to be obtained.** Attachment is incidental to the action in which it is sought, and can only be obtained in the court in which the action is pending. *Moore v. Sheppard*, 1 Met. 97.

(4) **Express and implied contracts.** Provisions of Code authorizing attachments make no distinction between express and implied contracts, and an attachment may be issued and sustained upon an implied contract. *Garriott v. Jaffray*, 10 Bush 413.

(5) **Four months' absence.** Where the debtor leaves his home intending to go

2. Who has been absent herefrom four months; or,
3. Has departed herefrom with intent to defraud his creditors; or,
4. Has left the county of his residence to avoid the service of a summons; or,
5. So conceals himself that a summons can not be served upon him; or,
6. Is about to remove, or has removed, his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim, or the claims of said defendant's creditors; or,
7. Has sold, conveyed, or otherwise disposed of, his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his creditors; or,

out of the State, and consummates this purpose, and is absent four months, his absence from his residence four months authorizes an attachment, though unexpected casualty may have delayed him in the State a few days after leaving his residence. *Spalding v. Simms*, 4 Met. 285.

(6) **Fraudulent conveyance.** It is necessary to show a fraudulent intent before the attachment is sued out; fraud originating afterward is not sufficient. *Warner v. Everett*, 7 B. M. 262. The statement in the affidavit that the defendant "is about to waste or dispose of his property, with the fraudulent intent to cheat, hinder and delay his creditors in the collection of their debts," is sufficient. *Lane v. Robinson*, 18 B. M. 623; and see *Clark v. Smith*, 7 B. M. 275. As to subjecting property fraudulently conveyed, see *Martz v. Pfeifer*, 80 Ky. 600.

(7) Where ground for attachment is that debtor has made a fraudulent conveyance of his property, the creditor has a right to an attachment although there may be one or more solvent sureties on note. *Perkins v. Scott*, 7 R. 589.

(8) **Insolvency.** This subdivision authorizes an attachment against all the property of the debtor not exempt from execution, whenever he is without a sufficiency subject to execution to satisfy debt sued on, although there may be no attempt on his part to defeat the collection of the debt. The evidence to sus-

tain the attachment must clearly show that the debtor did not have sufficient property subject to execution to satisfy the debt sued on. *Burdett v. Phillips*, 78 Ky. 246.

(9) To sustain the attachment, it must appear first, that the defendant has no property in this State subject to execution, or not enough thereof to satisfy the debt sued on; and second, that the collection of the demand will be endangered by delay in obtaining judgment, or a return of no property found. One of these conditions is not necessarily the concomitant of the other, although it may be so. *Francis v. Burnett*, 84 Ky. 24.

(10) It is not sufficient that debtor has not property sufficient to satisfy demand, it must also be alleged and proved that the collection of the demand will be endangered by delay, and while the former fact ordinarily raises a presumption of the existence of the latter, that presumption may be overcome. *Dunn v. McAlpin*, 90 Ky. 78; *First National Bank v. Kiefer Milling Co.*, 95 Ky. 97.

(11) Where there are two or more obligors within jurisdiction of this State, an attachment can not be obtained against any of them under this subdivision without alleging as to all of them that they have no property in this State subject to execution and the collection of demand will be endangered. 90 Ky. 78.

(12) If there is much doubt as to the value of defendant's property, the court

8. Is about to sell, convey, or otherwise dispose of, his property, with such intent. But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this State, for any claim other than a debt or demand arising upon a contract, express or implied, or a judgment or award.

Second: In an action for the recovery of money due upon a contract, judgment, or award, if the defendant have no property in this State subject to execution, or not enough thereof to satisfy the plaintiff's demand, and the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found.

Third: In an action to recover the possession of personal property which has been ordered to be delivered to the plaintiff, and which property, or part whereof, has been disposed of, concealed, or removed, so that the order for its delivery can not be executed by the sheriff.

will be reluctant to sustain attachment, and its value is to be determined by the opinions of witnesses. *Haynes v. Wiley*, 12 R. 299.

(13) In *Francis v. Burnett*, 84 Ky. 24, it was doubted if a creditor could obtain an attachment under this subdivision against the property of the debtor, when several were bound for the debt and combined owned more than enough property to pay it; and see note 11. It is also questionable whether a plaintiff has a right to purchase debts against a defendant, not in good faith, but for the sole purpose of obtaining an attachment on the ground that he does not own sufficient property to satisfy the demand. 84 Ky. 24.

(14) **Law to be strictly complied with.** Proceedings by attachment are summary and extraordinary, and, to be good, must conform to all the requirements of the law. *Pool v. Webster*, 3 Met. 278.

(15) **Leaving county to avoid service.** Where a debtor leaves the county of his residence to avoid arrest in a criminal proceeding, thereby preventing service of summons upon him in a civil action for the same wrong, subsection 4 of this section applies. *Bank of Commerce v. Payne*, 86 Ky. 446.

(16) **Non-residency.** Attachment may be

issued on the ground of non-residency, though defendant be casually in the State at the time. *Jackson v. Perry*, 13 B. M. 230; and see *Dudley v. Porter*, 1 B. M. 404; *Dudley v. Donaldson*, 2 B. M. 151.

(17) A non-resident in an action in this State may sue out an attachment on the ground that defendant is a non-resident. *Gray v. Briscoe*, 6 Bush 687.

(18) The plaintiff may have an attachment against the property of the defendant on the ground that he is a non-resident; but this fact alone is not sufficient to authorize a judgment setting aside a conveyance of his property because fraudulent in the meaning of section 1907 Kentucky Statutes. *Little v. Ragan*, 83 Ky. 321.

(19) Section 58, subsection 6, provides that the affidavit mentioned in that section shall be sufficient evidence of the facts therein stated to support the warning order and action, unless controverted. This provision was not in Code of 1854, and it was held that non-residency must be proved, unless the affidavit mentioned in section 409 was made. *Buckner v. Bush*, 1 Duv. 394; *Jackson v. McElroy*, 2 Bush, 132. See also sec. 126-3.

(20) **Pleading—proof.** If sufficient grounds are not alleged, proof upon the

§ 195. **Attachments for rent.** The provisions of chapter sixty-six, article two, General Statutes [now chapter seventy-five, article two, of the Kentucky Statutes], concerning attachments for rent, are adopted as part of this Code, subject to any modifications herein contained.

SUBDIVISION 2.

ATTACHMENT—HOW OBTAINED.

- § 196. Affidavit for attachment—requisites of.
- § 197. Officer's return—authorizes when.
- § 198. Bond for—form of.
- § 199. Order of attachment—requisites of—when returnable.
- § 200. Kentucky Statutes—certain sections applicable.
- § 201. Attachment may issue to any county—costs.

§ 196 [222] **Affidavit for attachment—requisites of.** An order of attachment shall be made by the clerk of the court in which the action is brought or pending, in any case mentioned in section one hundred and ninety-four, subsections one and two, if an affidavit of the plaintiff be filed in his office, showing—

matter will not be considered. *Dunn v. McAlpin*, 90 Ky. 78.

(21) **Removal of property.** A charge that defendant is removing from the State, unaccompanied with the statement that he is about to remove his property, or a material part thereof, out of the State, not leaving enough to satisfy the demand sued for, is defective. *Clarke v. Seaton*, 18 B. M. 226. See *Montgomery v. Tilley*, 1 B. M. 155; *Nutter v. Connet*, 3 B. M. 199; *Jenning v. Shropshire*, 9 B. M. 431, construing acts of 1828, 1838, similar to this subsection.

§ 195. **Attachment for rent.** See Ky. Stat., sec. 2302 and notes thereto.

§ 196. (1) **Affidavit—when petition will answer.** When the petition states all the facts necessary to authorize the issuing of the attachment and is sworn to, a separate affidavit is not necessary. *Scott v. Donehy*, 17 B. M. 321; *Franklin Bank v. Bank of Wheeling*, 1 Met. 156; *Worthington v. Carey*, 1 Met. 470; *Burnam v. Romans*, 2 Bush 191; and petition may be verified by attorney. *Clark v. Miller*, 88 Ky. 108.

(2) **Affidavit—requisites of.** Statement that affiant "is informed and believes," and verification that he "believes" statements are true, is not sufficient. *Williams v. Martin*, 1 Met. 42. The charge should be distinctly and unequivocally made, and when so made a verification that affiant believes the statements to be true is sufficient. *Ryan v. Bean*, 2 Met. 137; *Burnam v. Romans*, 2 Bush 191.

(3) Affidavit of agent that he believes facts stated in petition are true is sufficient (*Franklin Bank v. Bank of Wheeling*, 1 Met. 156); but he must state that the plaintiff is then absent from the county (*Pool v. Webster*, 3 Met. 278), and that he is agent for plaintiff. *Anderson v. Sutton*, 2 Duv. 480.

(4) Affidavit must be made before attachment issues; attachment issued without affidavit is void (*Bishop v. McQuery*, 13 Bush 417), and must state nature of claim and amount plaintiff ought to recover (*Scott v. Donehy*, 17 B. M. 321; *Allen v. Brown*, 4 Met. 342; 1 Met. 470); and failure to state that claim is just is a fatal defect. *Taylor v. Smith*, 17 B. M.

1. The nature of the plaintiff's claim.

2. That it is just.

3. The sum which the affiant believes the plaintiff ought to recover; and

4. The existence of any of the grounds for an attachment mentioned in subsections one and two of section one hundred and ninety-four; or, in the case mentioned in subsection three of section one hundred and ninety-four, if it be shown by such affidavit, or by the return of the sheriff upon the order for the delivery of the property claimed, that the facts mentioned in that subdivision exist. (*Form of affidavit, page 633; how and before whom made, secs. 551, 549; when by agent or attorney, sec. 550; may be amended, sec. 268; when order may issue on holiday, sec. 665.*)

§ 197⁽²²³⁾ **Officer's return—authorizes when.** A return by the sheriff upon a summons against a defendant, that he has left the county to avoid the service of the summons, or has concealed himself therein for that purpose, is equivalent to the statement of the fact in the plaintiff's affidavit.

§ 198⁽²²⁴⁾ **Bond to be executed before issual—form of.** The order of attachment shall not be issued by the clerk, until a bond has been

536; Bailey v. Beadles, 7 Bush 383; 2 Duv. 480; 4 Met. 342.

(5) Statement of the grounds of attachment in the alternative may be made. Wood v. Wells, 2 Bush 197; Hardy v. Traube, 4 Bush 644.

(6) The omission of the word "the" after the word "says" in the following verification did not render affidavit defective. "He says statements in the foregoing petition are true." 88 Ky. 108.

(7) **Amendment of affidavit.** It was held under the Code of 1854 that a defective affidavit, or petition on which an attachment was obtained, might be amended. Allen v. Brown, 4 Met. 342; Bailey v. Beadles, 7 Bush 383; sec. 268-2 of this Code provides that by an amended affidavit defect in former affidavit may be cured, or a new ground of attachment stated.

(8) When a defective affidavit is amended, it is good as against other attaching creditors only from the filing of the amendment. Bell v. Hall, 2 Duv. 288; Peters v. Conway, 4 Bush, 565; sec. 268-2.

(9) See Bamberger v. Moayon, 91 Ky. (9)

517, as to distinction between effect of amendment to petition and amendment to affidavit.

(10) **Attachment—when judge must order.** In action to enforce lien on, or for sale, recovery or partition of personal property (sec. 249), or to vacate fraudulent purchase (sec. 250), attachment can not be issued by clerk without order of a judge.

(11) **Description of property** to be attached in the petition will not create a lien if the attachment is invalid. Meyer v. Ruff, 13 R. 254.

(12) **Jurisdiction—defective affidavit.** The jurisdiction of the court in attachment cases depends upon the actual or constructive service of process upon the defendant and not upon the plaintiff's affidavit nor upon the clerk's order, and a defective affidavit does not render the judgment void. Paul v. Smith, 82 Ky. 451; Allen v. Brown, 4 Met. 342.

§ 198. (1) **Bond to be executed before issual of.** Bond must be executed before the clerk before he issues the attachment; attachment issuing before bond executed will be discharged. Anderson

executed in his office by one or more sufficient sureties of the plaintiff to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained, not exceeding double the amount of the plaintiff's claim. (*Form of bond, page 633; if defective, new one may be executed, sec. 682; sureties may be sworn, qualifications of, secs. 683, 684; additional security may be required, sec. 236.*)

v. Sutton, 2 Duv. 480; Horne v. Mitchell, 7 Bush 131. Bond not executed before the clerk nor in manner prescribed is not a defective bond that can be remedied as provided in sec. 682; 7 Bush 131.

(2) Bond executed to all the defendants jointly, or to defendants as a firm, is good as any of the defendants damaged may maintain an action on it. Voorheis v. Eiting, 15 R. 161.

(3) **Damages recoverable on bond.** In action on bond plaintiff can only recover damages for the injury sustained by being deprived of the use of his property, or its loss or deterioration, and the costs and expense incurred in defense of attachment. Pettit v. Mercer, 8 B. M. 51; Kaye v. Kean, 18 B. M. 839; Mitchell v. Mattingly, 1 Met. 237.

(4) The only damages that can be recovered on the bond are such as result from the order of attachment, and not the damages incurred by reason of the action independent of the attachment. Trapnall v. McAfee, 3 Met. 34; Shultz v. Morrison, 3 Met. 99; Burgen v. Sharer, 14 B. M. 497.

(5) If the whole costs and expense are incurred in defending the action, nothing can be recovered on bond, but if incurred in defending attachment alone, it can be; or if incurred partly in defending attachment, and partly in defense of the action, it is recoverable so far as applicable to the attachment. Johnson v. Farmers Bank, 4 Bush 283.

(6) Attorney's fees can be recovered only where plaintiff has paid or contracted to pay such fees and upon proof that they are reasonable, and the recovery is limited to the amount paid or agreed to be paid. Shultz v. Morrison, 3 Met. 99; 3 Met. 34; 8 B. M. 198.

(7) When by an attachment a party is

prevented from performing a contract, and material prepared to enable him to do so is thus depreciated in value to him, he can recover on the bond the damages caused by the depreciation. Carpenter v. Stevenson, 6 Bush 259.

(8) To maintain an action on the bond, it is necessary that the attachment should have been discharged; no action will lie until attachment is discharged. It is not necessary to allege either malice or want of probable cause, but it should be alleged that the attachment was wrongfully obtained, and the judgment discharging the attachment is conclusive evidence that it was wrongfully obtained. Kaye v. Kean, 18 B. M. 839; Nolle v. Thompson, 3 Met. 121; see Cooper v. Hill, 3 Bush 219.

(9) Right to sue on an attachment bond is transferred to assignee by general assignment. Francis v. Burnett, 84 Ky. 24; and see Cleveland Coal Co. v. Sloan, 90 Ky. 308.

(10) **Maliciously suing out attachment—action for.** Recovery of damages for maliciously suing out an attachment is a bar to an action for damages on the bond. In an action for maliciously suing out an attachment the plaintiff can recover damages for all his injuries of every character growing out of the wrongful issuing of the attachment. Hall v. Foreman, 82 Ky. 505. But the action will not lie until the attachment has been discharged. 3 Met. 121; 3 Met. 193.

(11) To maintain action for maliciously suing out an attachment, plaintiff must allege and prove want of probable cause and malice, and may recover for loss of credit, injury to business, impaired reputation, and costs and expense. Wood v. Weir, 5 B. M. 544;

§ 199 [122] **Order of attachment—requisites—when returnable.** The order of attachment shall be directed and delivered to the sheriff, with as many copies thereof as the plaintiff may direct. It shall require him to attach and safely keep the property of the defendant in his county not exempt from execution, or so much thereof as will satisfy the plaintiff's claim specified in his affidavit, which shall be stated in the order, and the probable costs of the action, not exceeding thirty dollars; also, to summon the garnishees to answer in the action on the return-day of the order, and to make due return thereof. The order shall be made returnable as an order of arrest is directed to be returned. (*Form of order, page 633; officer must indorse time of reception, sec. 674; may be directed to, and executed by, other officers, or person, secs. 667, 668; when returnable, sec. 156.*)

§ 200. **Kentucky Statutes—certain sections applicable.** The provisions of sections five, six, seven, eight of article thirteen, chapter thirty-eight, General Statutes [now sections 1697 to 1701, inclusive, of the Kentucky Statutes], are made applicable to attachments under this Code. (*These sections of statute relate to exemptions.*)

Mitchell v. Mattingly, 1 Met. 237; Pettit v. Mercer, 8 B. M. 51. See Fullenwider v. McWilliams, 7 Bush 389; and Chelf v. Penn, 2 Met. 463.

(12) Where an assignment for the benefit of creditors is made after an attachment has issued against the property of the assignor, the right to maintain an action for maliciously suing out the attachment is in the assignor. Francis v. Burnett, 84 Ky. 24.

(13) Where a firm make an assignment after the issual of an attachment they can not maintain an action against creditor for injury to firm credit or business; it passed to assignee. Cleveland Coal Co. v. Sloan, 90 Ky. 308.

(14) **Wrongful seizure—action for.** An action may be maintained as provided in sec. 7 Ky. Stat., for suing out an attachment without good cause. In this action plaintiff can only recover damages for the loss sustained by being deprived of the use of the property, or for injury resulting to it from the wrongful seizure and damages for the sale, if property sold, and his costs in attachment suit. The discharge of the attachment is conclusive that it issued without good

cause. Mitchell v. Mattingly, 1 Met. 237; and see notes to sec. 7 Ky. Stat.

§ 199. (1) **Officer who can execute.** The order can only be executed by the officer to whom it is directed, and can not, like a summons, be executed by any officer to whom it might have been directed. Menderson v. Specker, 79 Ky. 509. Sheriff can execute attachment issued by a justice of the peace. Turners v. Howard, 2 Duv. 112.

(2) **Property exempt from attachment.** Fees and allowances due by county to jailer can not be attached in hands of sheriff. Webb v. McCawley, 4 Bush 8; nor can pension money, before reaching pensioner. Eckert v. McKee, 9 Bush 355; Robion v. Walker, 82 Ky. 60; Johnson v. Elkins, 90 Ky. 163; nor can compensation due by State to teachers of common schools. Tracy v. Hornbuckle, 8 Bush 336; Allen v. Russell, 78 Ky. 105; nor is an indebtedness upon negotiable paper, before its maturity, subject to attachment. Greer v. Powell, 1 Bush 489; as to salary of officers of towns and cities, see Rodman v. Musselman, 12 Bush 354; it was held in Wilder v. Shea, 13 Bush 128, that a creditor of a railroad

§ 201 [222] Attachment may issue to any county—costs. Orders of attachment may be issued to the sheriff of any county; and several of them may, at the option of the plaintiff, be issued at the same time or in succession. But such only as have been executed in whole or in part shall be taxed in the costs, unless otherwise directed by the court.

SUBDIVISION 3.

EXECUTION AND RETURN OF.

- § 202. Precedence of attachments.
- § 203. Manner of executing.
- § 204. Duty of officer on whom executed—penalty.
- § 205. Garnishee—duties of—penalty.
- § 206. Personalty to be first taken.
- § 207. Fund in court—attachment of.
- § 208. Joint property—execution of bond by plaintiff.
- § 209. Joint property of joint debtors subjected.
- § 210. Attachments from different courts—proceedings.
- § 211. Bond of indemnity—officer may require.
- § 212. Lien created by attachment.
- § 213. Officer may pursue and attach in another county.
- § 214. Person in possession may execute bond and retain property.
- § 215. Appraisement of property retained.
- § 216. Defenses not allowed in action on bond.
- § 217. Return of officer—what it must show.

§ 202 [227] Precedence of attachments. Several orders of attachment against a defendant shall have precedence according to the time of

company could not attach its earnings in the hands of its officers, but see now Ky. Stat., sec. 814.

(3) *Reissual of order.* The plaintiff withdrew from the sheriff an order of attachment on which he had indorsed time of reception. A supplemental affidavit was filed and the clerk reissued the same order, erasing therefrom the indorsement. The order and levy made under it were held valid. *Dean v. Garnett*, 1 Duv. 408.

(4) *Requisites of.* Attachment which does not run in the name of the "Commonwealth of Kentucky" is void. Words and figures in the writ should be written in full. *Yeager v. Groves*, 78 Ky. 278; but an order of attachment indorsed on

back of a summons which runs in the name of the Commonwealth is valid, although the words "Commonwealth of Kentucky" do not appear on back of summons. *Northern Bank v. Hunt*, 93 Ky. 67.

(5) It is the attestation of the officer who issues that gives validity to the process, and in a conflict between words in the body of the writ over official signature, and unattested indorsement on its back, the words in body must prevail. *Peters v. Conway*, 4 Bush 565.

(6) As to stating amount of plaintiff's claim in the order of attachment, see *Burnam v. Romans*, 2 Bush 191.

§ 202. (1) *Precedence of attachments—duty of officer—presumption.* The pre-

their delivery to the sheriff, subject to the provisions of section two hundred and seven.

§ 203 [222] **Manner of executing.** The order of attachment shall be executed by the sheriff without delay in the following manner—

1. Upon real property, by leaving with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order.

2. Upon personal property capable of manual delivery, by taking it into his custody and holding it subject to the order of the court; or, if it be held by another officer under process or under a distress for taxes, by delivering to him a copy of the order, with a notice specifying the property attached.

3. Upon other personal property, by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or, as to a debt or demand, to the person owing it; or, as to stock in a corporation, or property held, or a debt or demand owing by it, to the officer or agent upon whom a sum-

sumption will be indulged in that the sheriff discharged his duty by levying first the attachment that first came to his hands, nothing being shown to the contrary. *Buckner v. Bush*, 1 Duv. 394; *Phelps v. Ratcliffe*, 3 Bush 334.

(2) The provisions of the Code in respect to the order in which attachments shall be levied are directory, and the failure of the sheriff to comply literally with them will not vitiate the lien resulting to the attaching creditor in whose behalf the levy has been made. The sheriff may amend his return. *Lane v. Robinson*, 18 B. M. 623; 3 Bush 334.

(3) If several attachments be delivered to a sheriff at different hours on same day and all are levied at same time they should be satisfied according to order of delivery. *Sewell v. Savage*, 1 B. M. 260.

(4) First levy gives prior lien as between several attaching creditors where the writs are in the hands of different officers. *Kennon v. Ficklin*, 6 B. M. 415, but where attachments are delivered to sheriff or his deputies it is his duty to levy them in order received, and although he may not observe this order, the court in distributing fund will do so.

Kennon v. Ficklin, 6 B. M. 414; *Clay v. Scott*, 7 B. M. 554.

(5) Where an attachment is in the hands of one officer and an execution in the hands of another officer, if the attachment be first levied it will have priority. *Bourne v. Hocker*, 11 B. M. 23.

§ 203. (1) **Acknowledgment of attachment** only creates lien from the time of the acknowledgment of service by defendant. *Phelps v. Ratcliffe*, 3 Bush 324.

(2) **Amendment of return.** Officer may amend his return to conform to the facts. *Lane v. Robinson*, 18 B. M. 623; *Newton v. Prather*, 1 Duv. 100; and if ambiguous it may be explained by other evidence. *Chamberlain v. Brewer*, 3 Bush 561.

(3) **Description of property.** The same particularity is not required in describing land levied on under attachment as under an execution; it is sufficient if the land can be identified. *White v. O'Bannon*, 86 Ky. 93.

(4) **Garnishees.** Lien is created by answer of garnishee, although service upon him is not sufficient to create lien. *City Nat. Bank v. Gardner*, 5 R. 689; *Paducah Lumber Co. v. Langstaff*, 6 R. 445.

mons may be served according to the provisions of section fifty-one, and by summoning the person or corporation to answer as a garnishee in the action. The sheriff shall deliver copies to, and summon, such persons as garnishees as the plaintiff may direct.

[But no notice need be given in any case describing or specifying the debt or demand attached, but only a notice that the person or corporation to whom the order of attachment is delivered is summoned to answer as a garnishee on or before the day and time on which the case is set for trial.] (*Words in brackets added by act 1886.*) (*Form of notice, page 634; when officer may execute on holiday, sec. 665; may break and enter building to execute, sec. 675; claimant of property may be made party, sec. 29.*)

§ 204. **Duty of officer on whom executed—penalty.** It shall be the duty of every officer upon whom an order of attachment may be executed pursuant to section two hundred and three, subsection two, to furnish an inventory and appraisement of the attached property held by him, or copies thereof, and a statement of the distress or process under which, and of the sum for which, it is held, to the officer executing the attachment; and to hold so much of the attached property, or of its proceeds, as may not be necessary to satisfy such process or distress, subject to the order of the court from which the attachment issued; and his failure to perform either of those duties may be punished by the court as a contempt.

(5) **Leaving property in charge of a third person.** The sheriff levied on a stock of goods, and left them in possession of the person in charge of the store, without closing it. The levy was valid, and the party held the goods as bailee of the sheriff. *Howell v. Com. Bank*, 5 Bush 93.

(6) **Levy after return day void.** The levy of an attachment after the return day is void. *Peters v. Conway*, 4 Bush 565.

(7) **Manner of executing on garnishee.** It was held in *Menderson v. Specker*, 79 Ky. 500, that a garnishee must be served with a copy of the order of attachment, together with a notice specifying the debt or demand attached. This case has been overruled by *Bell v. Wood*, 87 Ky. 56; and see amendment to subsection 3.

(8) **Personal property** must be first taken, sec. 206, but if an officer levy on land, although there may be personal estate, it will not render the levy invalid. 12 B. M. 114.

(9) **Powers of officer** in levying attachment, see Ky. Stat., sec. 4582.

(10) **Presumption that officer did his duty.** Where the return of the officer showed that he "posted a copy of the order on the premises, there being no tenant," it will be presumed that he posted it in a conspicuous place. *Lewis v. Quinker*, 2 Met. 284. And if return describes the property and states that it was levied on, without stating how, it will be presumed that he did his duty and complied with the law. *Anderson v. Sutton*, 2 Duv. 480; *Scott v. Scott*, 85 Ky. 385; *Phelps v. Ratcliffe*, 3 Bush 334; *Buckner v. Bush*, 1 Duv. 394.

(11) In an action against A, the officer's return stated that he left a copy of the order with B on the premises, without stating that B was the occupant. Held sufficient, as it will be presumed that B was the occupant. *Thomas v. Mahone*, 9 Bush 111.

§ 205 [220] **Garnishee—duty of—penalty.** It shall be the duty of every person mentioned in subsection three of section two hundred and three, to whom the sheriff shall apply therefor, to furnish him a certificate of the number of shares of the defendant in the stock of the corporation, or a description of the property held by such corporation or person for the benefit of the defendant, or belonging to him, or the amount of the debt owing to the defendant, by such corporation or person, whether due or not; and a failure to perform this duty may be punished by the court as a contempt.

§ 206 [220] **Personalty to be first taken.** The defendant's personal property shall be first taken under an attachment; if enough thereof be not found, then his real property.

§ 207 [221] **Fund in court—attachment of.** If the property to be attached be a fund in court, the attachment shall be executed by leaving with the clerk of the court a copy thereof, with a notice specifying the fund; and if several orders of attachment be executed upon such fund on the same day, they shall be satisfied out of it ratably.

§ 208 [222] **Joint property—execution of bond by plaintiff.** The sheriff shall not, in executing an attachment upon personal property held by the defendant in the attachment jointly or in common with another person, take possession of such property, until a bond be executed to such other person, by one or more sufficient sureties of the plaintiff, to the effect that he shall pay to such person the damages he may sustain by the wrongful suing out of the order, not exceeding double the amount of the plaintiff's claim. (*Form of bond, page 634; if defective, new one may be executed, sec. 682; sureties may be sworn, qualifications of, secs. 683, 684.*)

§ 209. **Joint property in action against joint debtors.** In an action against joint debtors, in which an interest in joint property is attached under an order of attachment against only a part of them, if judgment be rendered against all of the defendants, and the attachment be sustained, the court may subject the whole of the joint property, then undisposed of, to the satisfaction of the judgment. (*Meaning of "joint property," sec. 732-29.*)

§ 210. **Attachments from different courts—proceedings.** If attachments, levied on the same property, in whole or in part, be pending in different courts—

(12) **Property levied on** can not be seized or sold under an execution or by another officer so as to defeat rights of attaching creditors. *Husbands v. Jones*, 9 Bush

218; *Oldham v. Scrivener*, 3 B. M. 579; *Rogers v. Darnaby*, 4 B. M. 238.

§ 210. (1) **Transfer of attachments.** Clerk of one court must obey the order of

1. If the courts be of equal jurisdiction, either of them, or during vacation the judge thereof, may order the removal of so many of said attachments, and of the actions in which they may have been issued, as may be necessary to have all of them in one of said courts.

2. If the courts be not of equal jurisdiction, one of said courts of superior jurisdiction, or the judge thereof during vacation, may make said order of removal to one of said courts of superior jurisdiction.

3. Such order may be made on the motion of any party to either of said actions, after reasonable notice to all other parties to said actions or to their attorneys; and affidavits may be read for or against the motion.

4. Clerks of courts shall, pursuant to such order, immediately remove the papers in the case therein mentioned, accompanied by certified copies of the orders made therein; and, if the removal be to another county, the clerk shall have the fees allowed by law for like services in cases of change of venue—to be paid in advance by the applicant for the removal, and to be taxed in the costs, and finally paid out of the attached funds, or by such of the parties as the court may order.

§ 211. Bond of indemnity—officer may require. If an officer who levies, or is required to levy, an attachment upon personal property doubt whether it is subject to the attachment, he may give to the plaintiff therein, or to his agent or attorney, written notice that an indemnifying bond is required. If the plaintiff cause a bond to be executed, with good surety, to be approved by the officer, or the judge of the court from which the attachment issued, to the effect that the obligors will indemnify the officer against any damage he may sus-

another court removing attachments; and when the order of removal is made, it operates to divest the court from which the action is removed of all jurisdiction over it; and all motions pending and under submission at the time the order is made are thereafter pending in the court to which action is removed. *Schroll v. Speed*, 14 Bush 186.

(2) The circuit court has power to remove to it an attachment pending in a justice's court and levied on the same property as an attachment issued from the circuit court. *Turners v. Howard*, 2 Duv. 112.

(3) It is a condition precedent to the power of one court to order the transfer of cases from another, under the provisions of this section, that attachments shall have been levied. Although an action may have been improperly transferred from the court in which it was brought, the plaintiff, by moving for judgment in the court to which it has been transferred, waives his right to object to the jurisdiction. *Howe v. Stevenson*, 84 Ky. 576.

§ 211. Bond of indemnity. The taking of a bond of indemnity by the sheriff before levying an attachment does not

tain by reason of the levy of the attachment, such officer shall proceed to execute the attachment. If the attachment has not been levied, the officer may refuse to levy it unless bond be executed as above provided; or, if the attachment has been levied, the officer may release the property, unless such bond be executed within a reasonable time after the notice requiring it shall have been given. (*Form of bond, page 634; see references under, sec. 208.*)

§ 212. ^[223] **Lien created by attachment.** An attachment binds the defendant's property, in the county, which might be seized under an execution against him, from the time of the delivery of the order to the sheriff, in the same manner as an execution would bind it; and the lien of the plaintiff is completed upon any property or demand of the defendant by executing the order upon it in the manner directed in this article.

prevent a claimant of the property levied on from suing the officer on his official bond. *Lewis v. Mansfield*, 78 Ky. 460.

§ 212. (1) **Lien of attachment.** The lien of an attachment on land is not defeated or affected by the subsequent levy of an execution. *Husbands v. Jones*, 9 Bush 218.

(2) The lien created by the levy of an attachment will prevail against the rights of a grantee in a mortgage who has not actually accepted it, where the attachment lien is created subsequent to the making of the deed, but before its delivery. *Bell v. Farmers Bank*, 11 Bush 34.

(3) A lien is created by the levy of an attachment on an equitable interest in real estate. *Bank v. Barrick*, 1 Duv. 51.

(4) If the service of an attachment is acknowledged by the defendant, a lien is created on his estate only from the time of the acknowledgment. *Phelps v. Ratcliffe*, 3 Bush 334.

(5) A citizen of Ohio made in Ohio an assignment for the benefit of his creditors. Afterward a debt due the assignor by a citizen of this State was attached by a resident of this State in a court of this State. Held that the lien of the attaching creditor was superior to the claim of the assignee. *Johnson v. Parker*, 4 Bush 149; but see *Coffin v. Kelling*, 83 Ky. 649, impliedly overruling *Johnson v. Parker*.

(6) Service of an attachment upon a

common carrier did not create a lien upon the property of the defendant in the custody of the carrier in another State, although the carrier was within the jurisdiction of the court. No lien was created upon the property until it came within the county where the order of attachment was in the hands of the officer. *Sutherland v. Bank*, 78 Ky. 250.

(7) **Lien equitable only.** An attachment gives only an equitable lien, which must yield to a prior equity, such as may be created by an unrecorded assignment. *Ward v. Crotty*, 4 Met. 60; or the right of a vendor in goods that have been purchased with the fraudulent intention of not paying for them. *Lane v. Robinson*, 18 B. M. 623; or the claim of a creditor who has advanced money on property pledged to him by the delivery of the bill of lading. *Pettit v. Bank*, 4 Bush 334; or an assignee to whom the debtor has assigned by parol the debt attached before the service of the attachment. *Newby v. Hill*, 2 Met. 530; *Forepaugh v. Appold*, 17 B. M. 625; *Gray v. Briscoe*, 6 Bush 687; or the rights of partnership creditors to subject partnership property before debts which are not firm liabilities are paid out of the firm property. *O'Bannon v. Miller*, 4 Bush 25; 5 Bush 93; or the claim of a principal to funds owned by him and attached by creditors of his agent, in whose name they were deposited. *Skillman v. Miller*, 7 Bush 428.

§ 213^[224] **Officer may pursue and attach in another county.** If, after an order of attachment has been placed in the hands of the sheriff, any property of the defendant be removed from the county, the sheriff may pursue and attach it in another county within twenty-four hours after the removal.

§ 214^[225] **Person in possession may execute bond and retain property.** The sheriff may deliver any attached property to the person in whose possession it is found, upon the execution, in the presence of the sheriff, of a bond to the plaintiff, by such person, with one or more sufficient sureties, to the effect that the obligors are bound, in double the value of the property, that the defendant shall perform the judgment of the court in the action, or that the property or its value shall be forthcoming and subject to the order of the court. (*Form of bond, page 635 ; if defective, new one may be executed, sec. 682 ; sureties may be sworn, qualifications of, secs. 683, 684 ; executing bond enters appearance, 690.*)

(8) A deed of assignment executed and delivered to assignee takes precedence of an attachment placed in officer's hands after execution and delivery of deed but before it is lodged for record. *First Nat. Bank v. Kiefer Milling Co.*, 95 Ky. 97.

(9) **Order in officer's hands, with directions not to execute**, does not create a lien on the property of the defendant while it is in the hands of the officer, with instructions not to levy until ordered. *Gray v. Patton*, 13 Bush 625; and an assignment made by debtor while attachment is so held takes precedence over it. *Blakely v. Smith*, 16 R. 109.

§ 214. (1) **Claimant must present his claim.** A claimant of attached property who executes bond and retains the possession must present his claim, as provided in section 29, or he will be estopped from asserting it afterward. *Miller v. Desha*, 3 Bush 212.

(2) **Common law bond.** A bond executed before the levy of the attachment, but after it came into the officers' hands, is good as a common law bond. *Cook v. Boyd*, 16 B. M. 556.

(3) **Defendant may execute bond** for forthcoming of property under this section. *Hobson v. Hall*, 13 R. 109.

(4) **Discharge of attachment.** If the defendant desires to obtain a discharge of

the attachment and restitution of the attached property, he may do so by giving the bond provided for in section 221. When that bond is executed, all power of the court or its officers over the attached property ceases, and the plaintiff can look only to the bond. *Bell v. Western River Co.*, 3 Met. 557; the bond provided for under this section does not discharge the attachment, it is only an obligation for the forthcoming of the property. 3 Met. 557.

(5) **Enforcement of bond** for the forthcoming of property may be by rule or by action. *Oppenheimer v. Riley*, 6 Bush 118; and see sec. 232; 6 B. M. 597.

(6) **Liability of obligors if liens on property.** Where a forthcoming bond has been executed, and the property is not more than sufficient in value to satisfy prior liens upon it, subject to which the attachment was levied, the obligors in the bond are liable only for nominal damages for their failure to produce the property. *Hayman v. Hallam*, 79 Ky. 389.

(7) **Loss of property.** The claimant of attached property, having executed bond and taken possession of the attached property, failed to sustain his claim on the trial of the action, and was held liable for the value of the property (a horse), it having died without his fault

§ 215 [226] **Appraisement of property retained.** For the purpose of taking this bond, the sheriff shall cause the property to be appraised by three disinterested housekeepers, to be selected and sworn by him to make a fair appraisement, and who shall indorse their appraisement on the order of attachment. (*Form of appraisement, page 635.*)

§ 216 [227] **Defenses not allowed in action on bond.** In any proceeding on this bond it shall not be a defense that the property was not subject to the attachment.

§ 217 [228] **Return of officer—what it shall show.** The sheriff shall return upon every order of attachment what he has done under it. The return must show the property attached, when it was attached, and the disposition made of it. If garnishees be summoned, their names and the time when each was summoned must be stated. And if real property be attached, the sheriff shall describe it with sufficient certainty to identify it, and, if he can do so, he shall refer to the deed or title under which the defendant holds it. He shall return, with the order, all bonds taken under it.

during the pendency of the action. *Dear v. Brannon*, 4 Bush 471; see *Bush v. Groom*, 9 Bush 675.

(8) **Nature of the bond.** The bond is to be regarded as a mere obligation for the forthcoming of the property; the lien created by the attachment, and the power of the court over the attached property, subsist and continue as effectually as if no bond had been given, or the possession never taken out of the hands of the officer. *Bell v. Western River Co.*, 3 Met. 557; and continues until final judgment is rendered disposing of attachment. *Hobson v. Hall*, 13 R. 109.

(9) **Owner may execute bond and contest attachment.** The owner of property, in whose possession it is found, if it be levied upon by an attachment against another person, may give the bond provided for in this section, and is not precluded thereby from presenting his claim to the property, as allowed in section 29, and disputing the validity of the attachment. *Schwein v. Sims*, 2 Met. 209; and see *Halbert v. McCulloch*, 3 Met. 456.

(10) **Rights and liabilities of obligors.** The

obligors in a forthcoming bond are not exonerated by the delivery of part of the property, they are responsible for the full value of the property not delivered. *Bland v. Creager*, 13 B. M. 511; see further, 6 B. M. 597.

(11) Action upon the bond does not accrue until the case has been disposed of. *Hansford v. Perrin*, 6 B. M. 597.

(12) A peremptory rule against the obligors in such a bond to pay plaintiff's debt is erroneous. They should be allowed an opportunity to contest the existence of their liability, and the alternate right of discharging the bond by producing the property. *Oppenheimer v. Riley*, 6 Bush 118; *Taylor v. Taylor*, 3 Bush 118.

(13) **Strangers** who have come into possession of the property may be required by the court to produce it. *Hansford v. Perrin*, 6 B. M. 595.

§ 216. **Defenses not allowed.** If the attachment is sustained, in an action on the bond, the obligors can not put in issue and retry the question as to whether the property was subject to the attachment. *Schwein v. Sims*, 2 Met. 209.

SUBDIVISION 4.

DISPOSITION OF ATTACHED PROPERTY.

§ 218. Preservation, use or sale of attached property.

§ 219. Officer allowed expense of keeping property.

§ 220. Defendant and claimant required to give information concerning.

§ 218 [218] **Preservation, use or sale of attached property.** The court in which the action is pending, or during vacation the judge thereof, or, if he be absent from the county, the presiding judge of the county court, shall make proper orders for the preservation and use of attached property; and for the sale of it, if, by reason of its perishable nature, or the cost of keeping it, a sale of it would be beneficial to the parties; and for the collection and payment into court of attached funds and choses in action; and, for any of those purposes, may make an order appointing a receiver, with authority to act as the court may direct—who shall give bond with good surety, to be approved by the court or judge, for the faithful performance of his duties; but neither of those orders shall be made during vacation, except after reasonable notice, in writing, of the time and place of the application therefor, to the opposite party or his attorney, if either of them reside in the county in which the action is pending. Such sale shall be made publicly, after advertisement, and upon such terms of credit, with good security, as the court or judge, having regard to the probable duration of the action, may direct. Moneys received by the sheriff upon sales of attached property, or from garnishees, shall be held and paid by him under the same requirements and responsibilities of himself and his sureties as are provided in respect to money deposited in lieu of bail.

§ 219 [219] **Officer allowed expense of keeping property.** The sheriff or receiver shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed

§ 218. (1) **Disposition of attached property—practice.** Where it appears from the answer of a garnishee that the amount of his indebtedness is uncertain, depending on future contingencies, the court can do nothing more than to make such interlocutory order in the form of an injunction or otherwise as will protect the rights of the plaintiff; retaining control of the case for such further orders as may be proper. *Roberts v. Drinkard*, 3 Met. 309.

(2) The evidence upon which the inferior courts act in relation to the sale of personal property as authorized by this section is not required to be in writing, and, in the absence of anything to the contrary, it will be presumed the court acted correctly. *Dunn v. Salter*, 1 Duv. 342.

(3) A sale of attached property made under an order of the county judge should be reported to the court in which the action is pending, and that court has

in the costs. In the case of a steamboat attached, he may be allowed, for his own superintendence thereof, not exceeding one dollar per day, and such sums as he may actually expend for the safe-keeping of the boat, not to exceed, for the pay of persons employed, the usual wages of a mate and a deck-hand, unless more than two persons have been employed by the order of the court or of the judge thereof.

§ 220 [341] **Defendant and claimant required to give information concerning.** The court may require the defendant, or the claimant of any attached property, to appear before it, and give information, on oath, concerning the property: and if it appear from the plaintiff's affidavit, or the return of an order of attachment, that no property, or not enough to satisfy the plaintiff's claim, is known to the plaintiff or the officer, on which the attachment can be executed, the court may order the defendant to attend before it and give information, on oath, respecting his property; and if it also appear from the affidavit, that a person, other than the defendant, has in his possession property of the defendant, or evidences of debt, the court may require such person to appear before it, and give information, on oath, respecting the same; and the court may enforce those orders by process as in cases of contempt.

SUBDIVISION 5.

PROCEEDINGS UPON ATTACHMENTS.

- § 221. Bond of defendant to discharge attachment.
- § 222. Bond—sheriff or clerk may take.
- § 223. Garnishee—payment of money by—costs.
- § 224. Garnishee must appear and answer.
- § 225. Garnishee indebted to defendant—proceedings.
- § 226. Garnishee failing to answer—proceedings.
- § 227. Garnishee—action by plaintiff against.
- § 228. Judgment for defendant—effect of.
- § 229. Judgment for plaintiff—effect of.
- § 230. Real property—when sale of allowed.
- § 231. Surplus to be returned to defendant.
- § 232. Delivery of property and payment of proceeds—court may compel.

jurisdiction to confirm or set aside the sale so made. *Greer v. Powell*, 3 Met. 125.

(4) In an action under the act of 1856 to declare a mortgage made in contempla-

tion of insolvency, it was held that the court before final hearing might order a sale of the mortgaged property as provided in this section. *Terrill v. Jennings*, 1 Met. 450.

- § 233. Court to control property and proceeds.
- § 234. Sheriff may be ordered to retake property.
- § 235. Reference of attachments to commissioner.
- § 236. Bond—additional surety may be required.

§ 221 ⁽²⁴²⁾ **Bond of defendant to discharge attachment.** If the defendant, before judgment, cause a bond to be executed to the plaintiff by one or more sufficient sureties, approved by the court, to the effect that the defendant shall perform the judgment of the court, the attachment shall be discharged, and restitution be made of any property taken under it or of the proceeds thereof. (*Form of bond, page 635 ; if bond defective, new one may be executed, sec. 682 ; sureties may be sworn, qualifications of, secs. 683, 684 ; executing bond enters appearance, sec. 690.*)

§ 222 ⁽²⁴²⁾ **Bond—sheriff or clerk may take.** The bond mentioned in the last section may, in vacation, be executed in the presence of the sheriff having the order of attachment in his hands, or, after the

§ 221. (1) **Bond to discharge attachment—effect of.** When this bond is executed, all power of the court and its officers over the attached property ceases, and the plaintiff can look only to the bond. *Bell v. Western River Co., 3 Met. 557.* The attachment is discharged by operation of law, and the obligors in the bond are bound unconditionally to perform the judgment of the court in the action. In an action to enforce the bond, neither the sufficiency of the grounds of the attachment nor the liability of the property levied on can be inquired into, nor can the claims which any person may have to the attached property be investigated. *Hazelrigg v. Donaldson, 2 Met. 445 ; Taylor v. Taylor, 3 Bush 118 ; Inman v. Stratton, 4 Bush 445 ; Bell v. Western River Co., 3 Met. 557.*

(2) The property attached was owned by the surety in the bond executed under this section, but the surety could not resist the collection of the bond on that ground, nor on the ground that he had offered the sheriff a forthcoming bond as provided in sec. 214, which he had a right to execute, but the sheriff refused to accept. *Hazelrigg v. Donaldson, 2 Met. 445.*

(3) **Collection of by rule.** Collection of bonds taken under this section may be enforced by rule. *Leet v. Lockett, 4*

Met. 56 ; 12 Bush 416 ; sec. 232. But notice should be given to the obligors in the bond before judgment is given against them. *Taylor v. Taylor, 3 Bush 118.*

(4) **Forthcoming bond** may be executed by defendant or person in possession of property, as provided in sec. 214, and any defenses that may exist to grounds of attachment or to the ownership of the property levied on can be made on trial of attachment but not in action on bonds. *Schwein v. Sims, 2 Met. 209 ; Miller v. Desha, 3 Bush 212 ; Hobson v. Hall, 13 R. 109.*

(5) **Must be executed in court, if court in session.** Bond discharging the attachment must be executed in court, if the court is in session ; and such a bond, taken by the sheriff when the court is in session, can not be treated as a statutory bond. The Louisville Chancery Court is always in session, and a bond taken by the sheriff of Jefferson county, to discharge an attachment issued by the Louisville Chancery Court, can not be collected by rule. *Louisville R. R. Co. v. Masonic Bank, 12 Bush 416.*

(6) **Replevying judgment releases surety.** A surety in a bond given under this section is released from liability by the execution of a bond replevying the judgment rendered against the defendant. *Gray v. Merrill, 11 Bush 633.*

return of the order, before the clerk, with the same effect upon the attachment as if executed in court—the sureties, in either case, to be approved by the officer.

§ 223 (244) **Garnishee—payment of money by—costs.** The garnishee may pay the money owing to the defendant by him, not exceeding the plaintiff's claim and costs, to the sheriff having in his hands the order of attachment, or into the court; and to that extent he shall be discharged from liability to the defendant. He shall not be subjected to costs beyond those caused by his resistance of the claim against him; and, if he disclose the property of the defendant in his hands, or the true sum owing by him, and deliver or pay the same to the sheriff, or according to the order of the court, he shall be allowed his costs.

§ 224 (245) **Garnishee must appear and answer.** Each garnishee summoned shall appear. The appearance may be in person; or by the affidavit of the garnishee filed in court disclosing truly the sum owing by him to the defendant, whether due or not, and the property of the defendant in the possession or under the control of the garnishee; and, in the case of a corporation, any shares of stocks therein held by or for the benefit of the defendant, at or after the service of the order of attachment.

§ 225 (246) **Garnishee indebted to defendant—proceedings.** If a garnishee, or officer of a corporation summoned as a garnishee, appear in person, he may be examined on oath; and, if it be discovered on such

§ 223. (1) **Garnishee—payment by.** In an action in a justice's court by A against B, C was summoned as a garnishee; on the trial the attachment was discharged, and an appeal at once taken to the circuit court. Immediately after the judgment was rendered discharging the attachment, the garnishee, C, by direction of the justice, paid the money attached to B; on the trial in the circuit court the attachment was sustained and the garnishee required to pay the money attached to A; this judgment was affirmed. Whether a garnishee must hold money attached until time for taking appeal expires, not decided. *Puff v. Huchter*, 78 Ky. 146.

(2) **Garnishee—rights of plaintiff against.** The plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses, and his recourse is limited by the extent of the

garnishee's liability to the debtor. *N. & C. Bridge Co. v. Douglass*, 12 Bush 673; *Greer v. Powell*, 1 Bush 489.

(3) **Lien created by attachment.** See sec. 212 and notes thereto.

§ 224. (1) **Answer by garnishee** is sufficient to create a lien on the property attached in his hands, although the service upon him is defective. *City Nat. Bank v. Gardner*, 5 R. 689.

(2) Garnishee having answered admitting an indebtedness may be required to respond to an amended pleading alleging that he owes more than he has admitted. *Lee v. Walston*, 8 R. 129.

§ 225. (1) **Action terminated as to garnishee.** When a mere garnishee against whom no action has been instituted files an answer denying his liability, the case is terminated so far as his rights are to be affected, and the court has no right to hear proof conducing to show that his

examination that, at the service of the order of attachment upon him, he or the corporation was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property, and the payment, or security for the payment, of the sum owing by the garnishee, into court, or to such person as it may direct—who shall give bond, with security, for the same; or the court may permit the garnishee to retain the property or the sum owing, upon the execution of a bond, with one or more sufficient sureties, to the effect that the sum shall be paid, or the property be forthcoming, as the court may direct. Performance of such bonds, for the forthcoming of property, may be enforced as in cases of contempt: upon such bonds for payment of money, execution may be issued as upon replevin-bonds.

denial is untrue. When the garnishee fails to answer or does not make satisfactory disclosure, the court may hear proof. *Wilder v. Shea*, 13 Bush 128.

(2) **Claimant to be made party.** When the answer of the garnishee shows that the money sought to be recovered from him belongs to one not a party, the court should order him brought before it. *Forepaugh v. Appold*, 17 B. M. 625; *Martin v. Mobile R. R. Co.*, 7 Bush 116.

(3) **Contract—garnishee not required to violate**—or pay in things other than he contracted to pay. *Blackburn v. Davidson*, 7 B. M. 102; but he can not after garnishment change his liability and thereby avoid attachment. *Biggs v. Kouns*, 7 Dana 405.

(4) **Debt not due or liability contingent**—the court should make such orders in reference thereto as will protect the rights of the plaintiff, reserving control of the case for such orders as may be necessary. *Roberts v. Drinkard*, 3 Met. 309; and see *Sheriff v. Buckner*, 1 Litt. 126.

(5) **Garnishee—how proceeded against.** Where the garnishee in a general attachment has been summoned and appears, and discloses the amount of his indebtedness to the defendant, or where he makes default by failing to appear, and the court, as it may do, hears proof as to the amount of his indebtedness, he may be ordered to pay the amount into court or to a receiver, or may be allowed to retain it on the terms fixed by law. The court may make either of these orders at its

discretion, and as the circumstances of the case may render most appropriate, and may, by its process of rule and attachment, compel the garnishee to obey and perform its mandate as in like cases. When a garnishee fails to appear either in person or by affidavit, the court may coerce his personal appearance for examination, or may hear proof of his indebtedness. *Smith v. Gower*, 3 Met. 171.

(6) **Judgment against garnishee—effect of.** Judgment against a garnishee is equivalent to payment to his creditor, and if the judgment is rendered before he has notice of the assignment of his note by his creditor, it will be a valid defense against the assignee, although his assignment was prior to the judgment. *Coburn v. Currans*, 1 Bush 242.

(7) When the obligor in a note having notice of its assignment is summoned as a garnishee, and fails to disclose the assignment, or to make the assignee a party, he will be liable to the assignee, notwithstanding the judgment against him as garnishee. *Bibb v. Tomberlin*, 1 Duv. 186.

(8) **Judgment against garnishee** should provide that he be discharged from payment to his creditor to the extent of amount paid under judgment. *Atcheson v. Smith*, 3 B. M. 502.

(9) **Personal judgment—when may be rendered.** A personal judgment can not be rendered against a garnishee, enforceable by execution, unless he has been made a defendant to the action. If he is made a

§ 226 [247] **Garnishee failing to answer—proceedings.** If such garnishee or officer make default, by not appearing, the court may, on the motion of the plaintiff, compel him to appear in person for examination, by process as in cases of contempt; or it may hear proof of any debt owing or property held by the garnishee to or for the defendant, and make such order in relation thereto, as if what is so proved had appeared on the examination of the garnishee or officer.

§ 227 [248] **Garnishee—action by plaintiff against.** If a garnishee fail to make a disclosure, satisfactory to the plaintiff, the latter may bring an action against him, by petition or amended petition, in the same manner, and the proceedings therein shall be the same as in other actions; and the plaintiff may procure an order of attachment in the same manner, and the proceedings thereupon shall be the same, as is hereinbefore and hereinafter authorized concerning attachments—except that the plaintiff's affidavit shall state, in addition to the facts required to be stated in section one hundred and ninety-six, the sum which the defendant owes to the plaintiff's debtor; and the plaintiff shall not be entitled to attach for or recover more than that sum and costs nor more than the amount of the plaintiff's claim against his debtor and costs.

§ 228 [249] **Judgment for defendant—effect of.** If judgment be rendered in the action for the defendant, or if the attachment be discharged—

1. The property attached, or its proceeds, shall be returned to him.

2. The proceedings against a garnishee shall be dismissed.

(*Judgment for defendant attachment shall be discharged, sec. 260.*)

§ 229 [250] **Judgment for plaintiff—effect of.** If judgment be rendered for the plaintiff, the court shall apply in satisfaction thereof—

defendant to an action on a return of "no property," and served with process, and it is charged in the petition that he is indebted in a certain sum, on his failure to answer, judgment may be rendered against him for the amount. *Bowen v. Emmerson*, 4 Bush 345; *Griswold v. Popham*, 1 Duv. 170; *Smith v. Gower*, 3 Met. 171; *Joyce v. O'Toole*, 6 Bush 31.

(10) An allegation that A and B are indebted to C in an amount sufficient to satisfy the judgment sought to be collected, imports no more as to B than a separate indebtedness, which, together with the indebtedness of A, is sufficient to satisfy the judgment. *Warner v. Bryant*, 9 Bush 212.

(11) State can not be made garnishee. *Tate v. Salmon* 79 Ky. 540.

(10)

§ 226. **Rule may issue** against garnishee to bring money into court, or to produce property. *Cavanaugh v. Fried*, 3 R. 253; and see notes to sec. 225.

§ 227. (1) **Action against garnishee** may be prosecuted if he fails to make satisfactory disclosures, and attachment may be obtained against him. *Wearen v. Matheney*, 3 R. 710.

(2) **Garnishee who has answered** may be required to respond to an amended pleading alleging that he owes more than he has admitted. *Lee v. Walston*, 8 R. 129.

§ 228. **Costs.** The cost growing out of an attachment that is discharged should not be taxed against the defendant. *Southwood v. Myers*, 3 Bush 681.

§ 229. (1) **Claimant of attached property** may assert his claim as provided in sec.

1. Moneys arising from property sold pending the litigation.
2. Proceeds of the debts and funds attached in the hands of the garnishee.

If these be not sufficient to satisfy the plaintiff's claim, the court shall order a sale, by the sheriff, of any other attached property which may be under its control, in the following order:

1. Personal property.
2. Real property, or so much thereof as may be necessary to satisfy the plaintiff's claim. (*Judgment for plaintiff, attachment sustained—when, sec. 261; terms of sale, sec. 696.*)

§ 230 [231] **Real property—when sale of allowed.** No order for the sale of real property seized under attachment shall be made in any action in which the defendant has not appeared, or been actually summoned, until an affidavit of the plaintiff, or of his agent or attorney,

29. *Taylor v. Taylor*, 3 Bush 119; *Bank v. Overstreet*, 10 Bush 148; and creditor of attachment debtor may attack sufficiency of attachment. 10 Bush 148; 4 Bush 565.

(2) **Counter-claim.** Damages for suing out the attachment can not be pleaded as counter-claim in attachment suit. *Nolle v. Thompson*, 3 Met. 121.

(3) **Land lying in a county** other than that in which action is pending may be sold if levied on under attachment. *Nixon v. Jack*, 16 B. M. 174.

(4) **Motion for new trial** is not necessary to prosecute an appeal from an order sustaining an attachment. *Francis v. Burnett*, 84 Ky. 23.

(5) **Personalty to be first subjected.** Where an interest in both real and personal property has been attached, it is erroneous to order a sale of the realty without first subjecting the personal estate, or ascertaining there is none. *Davidson v. Simmons*, 11 Bush 330.

(6) Where garnishees are summoned, and it is alleged that they owe the defendant, before any real estate attached is sold, the funds in the hands of the garnishees should be applied to the payment of the debt. *Anderson v. Sutton*, 2 Duv. 480; and see *Perry v. Seltz*, 2 Duv. 122.

(7) **Personal judgment** for debt, although there has been no service of process, is proper when the defendant has filed an answer in which he does not controvert plaintiff's claim. *Bank of Commerce v. Payne*, 86 Ky. 446.

(8) **Pleading.** Denial in the answer of the grounds of attachment relied on makes an issue. *Talbot v. Pierce*, 14 B. M. 195.

(9) Where defendant has only an undivided interest with one not a party to the suit, it is error to order a sale of attached property without making other owner a party. 14 B. M. 195.

(10) **Practice**—Separation of conclusions of law and fact is not necessary in attachment cases. 84 Ky. 23.

(11) **Sale of land** under an attachment which had not been levied upon, the land passed no title to purchaser. *Robson v. Shea*, 5 R. 601.

(12) **Time** on which attached property should be sold. See 1 Duv. 342 and sec. 606.

§ 230. **Affidavit before sale of real property.** A judgment directing the sale of land in an action in which the defendant has not appeared, or been actually summoned, before the affidavit required by this section is made, is erroneous. *Jackson v. McElroy*, 2 Bush 132; *Payne v. Witherspoon*, 14 B. M. 270.

has been filed to the effect that the defendant has no personal property, or not enough to satisfy the claim of the plaintiff, in this State, known to the affiant.

§ 231 [202] **Surplus to be returned to defendant.** Any surplus of the attached property, or of its proceeds, shall be returned to the defendant.

§ 232 [203] **Delivery of property and payment of proceeds—court may compel.** The court may, by summary proceedings, compel the delivery to the sheriff, for sale, of any attached property for which a bond may have been given; or, for such sums of money as may be due upon such bonds, execution may issue as upon replevin-bonds. (*Provisions concerning summary proceedings, secs. 444 to 449.*)

§ 233 [204] **Court to control property and proceeds.** The court may, from time to time, make and enforce proper orders respecting the property, sales and the confirmation thereof; and the application and payment of the moneys collected.

§ 234 [205] **Sheriff may be ordered to retake property.** It may order the sheriff to repossess himself, for the purpose of selling it, of any attached property which may have passed out of his hands without having been sold or converted into money; and the sheriff shall, under such order, have the same power to take the property as upon an order of attachment.

§ 235 [206] **Reference of attachments to commissioner.** If several attachments be executed on the same property, the court, on the motion of any one of the attaching plaintiffs, may order a reference to a commissioner, to ascertain and report the amounts and priorities of the several attachments. (*If from different courts, may be removed to one court, sec. 210.*)

§ 236 [207] **Bond—additional surety may be required.** The defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court be satisfied that the surety in the plaintiff's bond have died or removed from this State, or is not sufficient for the amount thereof, it may vacate the order of attachment and direct restitution of any property taken under it, unless in a reasonable time, to be fixed by the court, sufficient security be given by the plaintiff.

§ 232. Rule may be issued against person having possession of attached property to compel its surrender for sale, or if person has disposed of property to require him to account for proceeds. *Turpin v. Smith*, 7 R. 371.

ARTICLE 2.

ATTACHMENT OR ORDER OF ARREST IN CERTAIN ACTIONS.

- § 237. Action before debt matures—when allowed.
- § 238. Attachment or order of arrest—how obtained.
- § 239. Requisites of attachment or order.
- § 240. Bond to be executed before issual.
- § 241. Sections of Code applicable.
- § 242. Judgment before debt due—costs—creditor to be party.
- § 243. Form of judgment in action by creditor—duty of court.
- § 244. Form of judgment in action by surety.
- § 245. Form of judgment in action by joint debtor.
- § 246. Money of defendant in court—how applied.
- § 247. General provisions concerning judgments.
- § 248. Joint debtor to pay his share before judgment in his favor.

§ 237 ^[239] **Action before debt matures—when allowed.** Before a debt or liability upon a contract becomes due or matures, an equitable action, for indemnity, may be brought by a creditor against his debtor; by a surety against his principal; or by one who is jointly liable with another, for such debt or liability, against the latter—

1. If the defendant be about to depart from this State, and, with intent to defraud his creditors, have concealed, or removed from this State, his property, or so much thereof that the process of court, after judgment, can not be executed.

2. If there exist against the defendant any of the grounds for an attachment which are mentioned in subsections three, four, five, six, seven and eight, of section one hundred and ninety-four. (*Form of judgment, 243, 244. Action by joint debtor or surety after debt matures, secs. 661, 662.*)

§ 238 ^[240] **Attachment or order of arrest—how obtained.** In such action, if the petition, verified by the oath of the plaintiff, show the nature and amount of the demand, and when it will mature, the court in which the action is pending [or the clerk thereof], or any circuit judge, or the presiding judge of the county court, may grant—

1. An order for the arrest of the defendant, if the petition also state the facts mentioned in subsection one of section two hundred and thirty-seven.

§ 237. (1) **Issual before execution of bond.** The county judge having directed clerk to issue attachment for debt not due upon execution of proper bond, an attachment issued before bond was executed is void. *Kleine v. Nie, 88 Ky. 542.*

(2) **Surety** may maintain action against his principal for indemnity before debt falls due. *Bamberger v. Moayon, 91 Ky. 517.*

§ 238. **Construction of section.** Ourbacker v. Clafflin, 16 R. 436.

2. An attachment against the property of the defendant, if the petition also show the existence of any of the grounds specified in subsection two of section two hundred and thirty-seven. (*Words in brackets inserted by act 1888; when two justices may grant, sec. 689.*)

§ 239 [1881] **Requisites of attachment or order.** The order of arrest, or attachment, shall specify the sum for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim and the probable costs of the action. (*Forms of orders, pages 630-633.*)

§ 240 [1881] **Bond to be executed before issual.** Such order of arrest, or attachment, shall not be issued by the clerk until, if it be an order of arrest, bond be executed pursuant to section one hundred and fifty-four; nor, if it be an order of attachment, until bond be executed pursuant to section one hundred and ninety-eight. (*When may issue on holiday, sec. 665.*)

§ 241 [1881] **Sections of code applicable.** 1. The provisions of chapter one, of title viii, subsequent to section one hundred and fifty-four, shall, so far as applicable, regulate arrests authorized by this article.

2. The provisions of the first article of this chapter subsequent to section one hundred and ninety-eight shall, so far as applicable, regulate attachments authorized by this article.

§ 242. **Judgment before debt due—costs—creditor to be party.** 1. Judgment may be rendered, in an action brought pursuant to section two hundred and thirty-seven, concerning the alleged liability of the defendant, though it may not have matured.

2. Unless the creditor bring the action, he must be made defendant, but shall not be liable for costs.

§ 243. **Form of judgment in action by creditor—duty of court.** If such action be brought by the creditor, and judgment be rendered against the defendant, it shall be that he pay to the plaintiff the amount of the judgment, or, if the demand have not matured, that he pay said

§ 239. **Statement of amount in order.** The order did not state the amount for which it was allowed, but stated that it "was according to the prayer of the petition." The petition specified the amount of the debt, and the prayer was for judgment for the debt. Held sufficient. *Burnam v. Romans*, 2 Bush 191. And an order directing clerk to issue an attachment for amount claimed in petition, without specifying amount,

is sufficient. *Kliene v. Nie*, 88 Ky. 542.

§ 242. **Creditor is necessary party**, but failure to make him a party does not render void attachment issued in the action, and defect may be cured by amendment. *Bamberger v. Moayon*, 91 Ky. 517.

§ 243. **Judgment may go for debt due at time judgment is rendered**, but not due when action was instituted. *Kleine v. Nie*, 88 Ky. 542.

amount at the time of such maturity : and the court shall apply, in satisfaction of the judgment, moneys of the defendant under its control, though the demand have not matured.

§ 244. Form of judgment in action by surety. If such action be brought by a surety against his principal, and judgment be rendered against such defendant, it shall be that he pay to the creditor the amount of the judgment ; or, if the demand have not matured, that he so pay said amount at the time of said maturity. (*See further, sec. 247.*)

§ 245. Form of judgment in action by joint debtor. If such action be brought by one who is jointly liable with another, against the latter, and judgment be rendered against such defendant, it shall be, that he pay to the creditor so much of his demand as such defendant is equitably liable for, as between him and the plaintiff ; or, if the demand have not matured, that he pay said amount at the time of said maturity. (*See further, secs. 247, 248.*)

§ 246. Money of defendant in court—how applied. In actions mentioned in section two hundred and forty-four, or section two hundred and forty-five, moneys of the defendant under control of the court shall be applied in satisfaction of the judgment when the demand matures, or, with the creditor's consent, before it matures ; and, until so applied, such moneys, and property of the defendant attached in the action, shall be under the control of the court.

§ 247. General provisions concerning judgments. In every action brought pursuant to section two hundred and thirty-seven—

1. A judgment against the defendant shall include a judgment for costs in favor of the plaintiff.

2. Such judgments may be enforced as in equitable actions generally, except that executions upon judgments rendered pursuant to section two hundred and forty-four, or section two hundred and forty-five, shall be in favor of the plaintiff for the benefit of the creditor, and shall be so indorsed by the clerk.

3. In rendering judgment before maturity of the demand, the court shall make an abatement, on account of interest ; and shall make the judgment bear interest from the day of its rendition until it shall be satisfied, according to the rate of such abatement.

§ 248. Joint debtor to pay his share before judgment in his favor. No judgment shall be rendered pursuant to section two hundred and forty-five, until the plaintiff shall have paid into court money enough to satisfy the residue of the creditor's demand ; or shall have filed in court the creditor's receipt therefor, or his release or assignment to the plaintiff of his right to the demand, or to said residue.

ARTICLE 3.

SPECIFIC ATTACHMENTS.

- § 249. Actions in which allowed—affidavit for.
- § 250. Fraudulent purchase to cancel.
- § 251. Court or judge that may grant.
- § 252. Plaintiff to execute bond—retention of property by defendant.
- § 253. Attachment not to issue until bond executed.
- § 254. Order of attachment—requisites and execution of.
- § 255. Disposition of attached property.
- § 256. Officer may pursue and retake in another county.
- § 257. Defendant to give information concerning.
- § 258. Sections of Code applicable.

§ 249 [273] **Actions in which allowed—affidavit for.** In an action to enforce a mortgage of, or lien upon, personal property; or, for the recovery, partition or sale of such property; or, by a plaintiff having a future estate or interest therein for the security of his rights, if it satisfactorily appear, from a verified petition, or from affidavits, or the proofs in the cause, that the plaintiff has a just claim, and that the property is about to be sold, concealed or removed from the State; or if the plaintiff state on oath that he has reasonable cause to believe and does believe that, unless prevented by the court, the property will be sold, concealed or removed from the State, an attachment may be granted against the property. (*How and before whom affidavit made, secs. 551, 549; when by agent or attorney, sec. 550.*)

§ 250 [274] **Fraudulent purchase to cancel.** In an action by a vendor of property fraudulently purchased, to vacate the contract and have a restoration of the property or compensation therefor, if the petition show such fraudulent purchase and the amount of the plaintiff's claim, and be verified by his oath, an attachment against the property may be granted.

§ 251 [275] **Court or judge that may grant.** The attachments in the cases mentioned in sections two hundred and forty-nine and two hundred and fifty may be granted by the court in which the action is brought, or by the judge thereof, or any circuit judge, or the presiding judge of the county court, upon such terms and conditions as to security, on the part of the plaintiff, for the damages which may be occasioned by them, and with such directions as to the disposition to be made of the attached property, as may be just and proper under the circumstances of each case. (*When two justices may grant, sec. 689.*)

§ 249. Affidavit is sufficient that follows the language of this section in stating grounds of attachment, and if petition

states amount of debt, it is not necessary to repeat amount that plaintiffs ought to recover. *Bell v. Mansfield*, 12 R. 89.

§ 252 [276] **Plaintiff to execute bond—retention of property by defendant.** In every case, the plaintiff shall be required to give bond, with surety, for the damages to the defendant, in an adequate sum to be specified in the order granting the attachment; and, if proper, the court or judge may direct that the defendant, or person in possession of the attached property, shall be permitted to retain it, upon giving such bond with surety, and for such sum, as the court or judge may prescribe.

§ 253 [277] **Attachment not to issue until bond executed.** No order of attachment shall be issued by the clerk until the bond on the part of the plaintiff, required by the order of the court or judge, be executed in his office by one or more sufficient sureties of plaintiff. (*When may issue on holiday, sec. 665; sureties may be sworn, qualifications of, secs. 683, 684.*)

§ 254 [278] **Order of attachment—requisites and execution of.** The order of attachment shall describe the specific property against which it is issued, and the direction of the court or judge, as to the disposition to be made of the attached property, shall be indorsed upon it. It shall be directed, executed and returned, as other orders of attachment.

§ 255 [279] **Disposition of attached property.** The sheriff shall make such disposition of the attached property as may be directed by the court or judge; or, if there be no direction upon the subject, he shall safely keep the property subject to the order of the court.

§ 256 [281] **Officer may pursue and retake in another county.** If, after an order of attachment against specific property has been placed in the hands of the sheriff, such property be removed from the county, the sheriff may pursue and attach it in another county within twenty-four hours after such removal.

§ 257 [282] **Defendant to give information concerning.** If it appear from the return of the sheriff, or the affidavit of the plaintiff, that any specific property, against which an order of attachment is issued, has been concealed or removed by the defendant, the court may require him to attend and be examined on oath respecting such property, and may enforce its orders in this respect as in cases of contempt.

§ 258 [283, 284] **Sections of Code applicable.** The provisions of the first article of this chapter, not inconsistent with, nor inapplicable to, the foregoing sections of this article, shall regulate the proceedings in cases of attachments against specific property.

§ 252. **Bond—liability on.** In an action to enforce a lien on a boat, the defendant executed a bond for the forthcoming of the property, and it appearing that the boat was mortgaged, and that the equity of redemption in the property was all

that could be subjected, to the extent only of the value of that equity could the obligors be held liable. *Halbert v. McCulloch*, 3 Met. 456; and see *McKee v. Pope*, 18 B. M. 548.

ARTICLE 4.

DISCHARGE AND REINSTATEMENT OF ATTACHMENTS.

- § 259. Time when sustained or discharged.
- § 260. Judgment for defendant discharges.
- § 261. Judgment for plaintiff sustains unless controverted.
- § 262. Property applied to pay judgment if sustained.
- § 263. Affidavit controverting grounds—how regarded—time to file.
- § 264. Trial of attachment—evidence.
- § 265. Motion to discharge—notice.
- § 266. Order discharging or sustaining—appeal.
- § 267. Reinstatement—motion to discharge.
- § 268. Motion to discharge—practice—amendment of affidavit.
- § 269. Time allowed to have reinstated.
- § 270. Appellate judge may reinstate—effect.

§ 259 [300] **Time when sustained or discharged.** An attachment obtained at the commencement of an action shall be sustained or discharged when judgment is rendered in the action, unless, for sufficient cause, the court extend the time of deciding upon it. An attachment obtained after the commencement of an action shall not be sustained until the defendant has had the time for controverting it provided in this chapter.

§ 260 [300] **Judgment for defendant discharges.** If judgment be rendered in favor of the defendant the attachment shall be discharged. (*Effect of sec. 228.*)

§ 261 [301] **Judgment for plaintiff sustains unless controverted.** If judgment be rendered in favor of the plaintiff, and no answer nor affidavit of the defendant be filed, denying the statements of the affidavit upon which the attachment was issued, nor motion made to discharge it, the court shall sustain the attachment.

§ 262 [301] **Property applied to pay judgment if sustained.** Upon an attachment being sustained, the property attached, or its proceeds, or the securities taken upon the attachment, shall, by appropriate orders, be applied in satisfaction of the judgment. (*Order in which applied, sec. 229.*)

§ 263 [301] **Affidavit controverting grounds—how regarded—time to file.** The defendant may file his affidavit denying all or any of the material statements of the affidavit on which the attachment is issued; and,

§ 259. Order discontinuing action as to a garnishee did not have the effect of discharging levy of attachment on land, which was sought to be subjected, although the land had been purchased by garnishee. *Hand v. Fritsch*, 7 R. 439.

§ 263. (1) **Filing affidavit enters appearance.** Filing an affidavit controverting the grounds of the attachment enters the appearance of the defendant. The words "have no other effect" were introduced merely for the purpose of preventing the

thereupon, the attachment shall be considered as controverted, and the affidavits of the plaintiff and defendant shall be regarded as the pleadings concerning the attachment, and have no other effect. If the attachment was obtained at the commencement of the action, the defendant may file his affidavit at such time after the levy of the attachment as is given by this Code for filing his defense after the service of the summons—which period may be extended by the court for sufficient cause. (*When defense must be filed, sec. 102.*)

§ 264 [300] **Trial of attachment—evidence.** The trial of the attachment shall be by the court; and the witnesses shall be orally examined, except in cases wherein depositions might be read in an ordinary action. (*When depositions may be read, sec. 554; person on whose affidavit attachment issued may be examined, sec. 548.*)

§ 265 [301] **Motion to discharge—notice.** At any time before the attachment is sustained the defendant, upon reasonable notice to the plaintiff or his attorney, may move for its discharge; and the hearing of such motion may be postponed by the court, upon sufficient cause, from time to time; and upon the hearing, if the court be of opinion that the attachment was obtained without sufficient cause, or that the grounds of the attachment, being controverted, are not sustained, it shall be discharged.

§ 266 [302] **Order discharging or sustaining—appeal.** An order for the discharge of an attachment, made at or after the rendition of judg-

affidavit from being regarded as evidence. *Duncan v. Wickliffe*, 4 Met. 117.

(2) **Creditors of defendant can contest attachment.** Creditors of a defendant, claiming under a deed of assignment made by him for the benefit of his creditors, can controvert the grounds of an attachment levied on his property a short while before the deed of assignment was made. *Bamberger v. Halberg*, 78 Ky. 376; and see sec. 29 and notes thereto as to the rights of claimants; and *Peters v. Conway*, 4 Bush 565.

(3) **Pleading.** The defendant can controvert in his answer the grounds of attachment. *Talbot v. Pierce*, 14 B. M. 195; sec. 261.

(4) If the defendant appears and fails to contest the grounds of attachment, the court will regard it as valid. *Spalding v. Simms*, 4 Met. 285.

(5) **Rights of attaching creditors.** Creditors attaching mortgaged property can make all the defenses against the mort-

gagee the mortgagor could make, so far as may be necessary for the protection of their attachment liens. *Pearce v. Hall*, 12 Bush 209.

§ 264. **Evidence on trial.** Affidavits can not be read on the trial of attachments. No other proof than oral testimony or depositions is admissible. *Newton v. West*, 3 Met. 24.

§ 265. **Court may discharge at any time.** Although the court refused to discharge an attachment on a motion made for that purpose, it may, without additional evidence, discharge it on final hearing. *Talbot v. Pierce*, 14 B. M. 195; 17 B. M. 536. And it may, after the trial is commenced and part of the evidence given to the jury, entertain a motion to, and discharge the attachment. *Taylor v. Smith*, 17 B. M. 536.

§ 266. (1) **Appeal—when allowed.** A preliminary order sustaining an attachment is not a final order, and can not be appealed from (*Hanson v. Bowyer*, 4 Met.

ment in the action, shall be final; and can not be reinstated as is authorized by section two hundred and seventy; but shall be the subject of appeal, if the amount in controversy be such as to authorize an appeal. An order sustaining an attachment shall, in like manner, on the rendition of judgment in the action, be the subject of appeal.

§ 267 (293) **Reinstatement—motion to discharge.** The reinstatement of attachments, as provided in section two hundred and seventy, shall only be binding on the inferior court until judgment; and when judgment is rendered in the action the inferior court shall make a disposition of the motion to discharge—which shall, in like manner, be final.

§ 268 (294) **Motion to discharge—practice—amendment of affidavit.** 1. The defendant, on reasonable notice to the plaintiff, may, at any time before the term next after the levy of the attachment, move the judge of the court, in vacation, to discharge the attachment, on the ground of its having been issued contrary to the provisions of article one of this chapter; and the judge, on an inspection of the papers in the action, or of authenticated copies of them, shall have the same power of discharging the attachment, by his written order, filed by the clerk, as he would have in court; and shall have like power to permit amendments by the plaintiff.

2. A plaintiff may, by an amended affidavit, conforming to section one hundred and ninety-six, cure a defect in the affidavit upon which he obtained an attachment; or may state a ground of attachment not mentioned in his first affidavit, whether it may have ex-

108); nor can an appeal be taken from a preliminary order discharging an attachment. *Leet v. Lockett*, 4 Met. 55; *Overby v. Gay*, 17 B. M. 144; see secs. 269, 270.

(2) **Practice—Appeal.** A motion for a new trial is not necessary in order to bring a judgment sustaining an attachment before the Appellate Court; nor is it necessary to state separately the law and the facts. *Francis v. Burnett*, 84 Ky. 24.

(3) The defendant may appeal from an order sustaining the attachment, and not from the judgment for the debt. Such appeal will not prevent the plaintiff from collecting by execution his judgment, but will stay a sale of the attached property if a supersedeas be executed. *Hawkins v. Baldauf*, 10 Bush 624.

§ 267. See notes to sec. 266.

§ 268. (1) **Amendment of petition.** Defective petition may be cured by an amendment which does not state a new cause of action, and the amendment will relate back to the filing of petition and give plaintiff priority over another lien created after petition is filed and before amendment; the provision as to amendment of affidavit for attachment does not apply to the petition. *Bamberger v. Moayon*, 91 Ky. 517.

(2) **Amendment of affidavit** for attachment does not relate back to original affidavit or give plaintiff priority over creditors who have obtained attachments before amendment; 91 Ky. 517; it is good as against other attaching creditors only from date of filing. *Bell v. Hall*, 2 Duv. 238; *Peters v. Conway*, 4 Bush 565.

isted when he filed the first affidavit, or may have arisen afterward; and may thus acquire a lien upon the attached property, if the proceedings conform to law in other respects; but such lien shall not affect a *bona fide* right to, or lien previously acquired upon, the property, by attachment or otherwise.

§ 269 [300] **Time allowed to have reinstated.** A plaintiff who desires a reinstatement of an attachment may have an entry made upon the record, of leave to apply therefor within a reasonable time, not exceeding twenty days; whereupon, the order of discharge shall be made, to take effect at the end of the period so limited, unless the attachment be reinstated in the meantime.

§ 270 [300] **Appellate judge may reinstate—effect.** A judge of the Court of Appeals, if the plaintiff have secured the right to apply for the reinstatement of an attachment, may, upon an inspection of a copy of the record, including the evidence read upon the motion to discharge, reinstate the attachment; and, if the order of reinstatement be filed in the clerk's office of the court in which the action is pending, within the time limited as provided in section two hundred and sixty-nine, the execution of the order of attachment shall proceed; otherwise, it shall stand discharged, and restitution shall be made of any property taken under it. (*See further, secs. 266, 267.*)

CHAPTER IV.

INJUNCTION.

- ARTICLE 1. WHEN AND HOW OBTAINED, 271.
2. DISSOLUTION AND REINSTATEMENT OF, 289.

ARTICLE 1.

WHEN AND HOW OBTAINED.

- § 271. Injunction defined—mandatory injunction.
- § 272. Temporary injunction—cause for.
- § 273. Officers who may grant.
- § 274. Granted before judgment—court may control.
- § 275. Defendant who has answered to be notified.
- § 276. Notice of application for—when not required.
- § 277. Affidavits may be read on application for.
- § 278. Bond to obtain—requisites of.
- § 279. Bond to be executed before issual.
- § 280. Sureties in bond to be accepted by clerk.
- § 281. Order of injunction—requisites and service of.

- § 282. Service of order when unnecessary—party when bound.
- § 283. When binding on defendant.
- § 284. Judgments that can not be enjoined.
- § 285. Judgment to be enjoined in court rendering.
- § 286. Disobedience of—how punished.
- § 287. Affidavits read on application to be filed.
- § 288. Surety in bond—additional may be required.

§ 271. **Injunction defined—mandatory injunction.** An injunction may be the final judgment in an action, or may be allowed as a provisional remedy, and, if so allowed, it shall be by order. When any mandatory injunction shall be granted, the order or judgment may affirmatively direct the party enjoined to do the act or thing required to be done. The writ of injunction is abolished. (*Sec. as amended by act 1894.*)

§ 272. **Temporary injunction—cause for.** If it appear from the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of an act which would produce great or irreparable injury to the plaintiff; or if, during the litigation, it appear that the defendant is doing, or threatens or is about to do, or is procuring or suffering to

§ 271. (1) **Effect of injunction.** The Civil Code has not diminished or changed the force or effect of an injunction. When issued by proper authority, it must be obeyed by all persons to whom it is directed. *Keith v. Wilson*, 3 Met. 202.

(2) **Grounds upon which it may be issued.** The only grounds upon which courts of equity may grant injunctions are not specified in the Code. The provisions of the Code upon this subject were not intended to take away other well-recognized grounds of equity jurisdiction which may be found necessary for the full and proper administration of justice. *Gates v. Barrett*, 79 Ky. 295; and see notes to sec. 272.

(3) **Injunction—in what court to be obtained.** An injunction is merely incidental to the action in which it is sought, and can only be obtained in the court in which the action is pending. *Moore v. Sheppard*, 1 Met. 97.

(4) **Jurisdiction to grant.** The Butler Circuit Court has no jurisdiction to enjoin the use of a ferry privilege granted by the Ohio County Court. *Stahl v. Brown*, 84 Ky. 325.

(5) **Mandamus not stayed.** A railroad company obtained a writ of mandamus to compel the county judge to issue certain bonds. The taxpayers could not enjoin the judge from complying with the writ. *C. & O. R. R. Co. v. Washington Co.*, 10 Bush 564.

(6) **Verdict—effect of** may be preserved by injunction; as where a party sued to recover damages for obstructing passway and to enjoin future obstructions, and after a jury returned a verdict determining his right to passway, he filed amended petition setting up verdict, and case being transferred to equity, injunction was granted. *Hunt v. Kemper*, 10 R. 593.

§ 272. (1) **Distribution of property** under a will may be enjoined until an action to set aside the will can be tried. *Sanders v. Sanders*, 17 B. M. 10; and see Ky. Stat., sec. 4851.

(2) **Ferry privilege** is a franchise and the right to its enjoyment may be protected from disturbance by injunction. *Hazelip v. Lindsey*, 93 Ky. 14.

(3) **Injury to property** constantly recurring may be restrained by injunction. *Greenup Co. v. M. & B. S. R. R.*, 88 Ky. 659.

be done, an act, in violation of the plaintiff's rights, respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case in which it is specially authorized by statute. (*May be granted in action to settle estates, sec. 436; in forcible entry and detainer, sec. 467; in proceedings to stay and vacate judgments, secs. 378, 523; to quash execution, sec. 406; as to judgments, secs. 284, 285.*)

(4) **Illegal tax or assessment.** The right to have an injunction to restrain the collection of an illegal tax is unquestioned. *Gates v. Barrett*, 79 Ky. 295; *Allison v. L. & H. R. R. Co.*, 9 Bush 247; *L. & N. R. Co. v. Warren Co.*, 5 Bush 243; and an illegal assessment final in its character may be enjoined. *Baldwin v. Shine*, 84 Ky. 502.

(5) **Nuisance.** As to restraining and suppressing a nuisance, see *Hahn v. Thornberry*, 7 Bush 403; *Dumesnil v. Dupont*, 18 B. M. 800; *Louisville Coffin Co. v. Warren*, 78 Ky. 400; *Seifried v. Hays*, 81 Ky. 377; and injunction will lie to prevent erection of house that will do great injury. *Miley v. A'Hearn*, 13 R. 834; but injunction against a threatened nuisance will not be granted when the thing complained of is not *per se* a nuisance. *Pfingst v. Senn*, 94 Ky. 556.

(6) **Prosecutions under invalid ordinance.** Numerous warrants having been issued against the defendant, charging him with violating a city ordinance in holding possession of certain property. Held that the defendant who claimed the property had a right to enjoin the city from prosecuting him until the right to the property could be determined; the amount of the fine for violating the ordinance not being sufficient to authorize an appeal, an injunction was the only remedy. *Shinkle v. City of Cov.*, 83 Ky. 420; and see *Brown v. Trustees*, 11 Bush 435; and prosecutions under a void ordinance may be enjoined. *City of Newport v. Bridge Co.*, 90 Ky. 193; *South Cov. R. v. Berry*, 93 Ky. 43.

(7) **Remedy at law.** If a party has a good defense at law and fails to present it, or it is disallowed by the verdict, he can not obtain relief by injunction. *Tal-*

bot v. Bank, 2 J. J. M. 548; *Harrison v. Lee*, 7 J. J. M. 171; *McCoun v. Macklin*, 7 Bush 308; *Walker v. Thomas*, 88 Ky. 486; and see sec. 17.

(8) **Restraint of trade.** Violation of valid contract concerning may be enjoined. *Sutton v. Head*, 86 Ky. 156.

(9) **Threatened breach of contract** may under some circumstances be restrained by injunction. *Duncan v. Central Pass. R. R.*, 85 Ky. 525.

(10) **Title to property—to protect.** A purchased from B a tract of land in Illinois, and paid him the purchase price, accepting a deed. The acknowledgment of the deed was so defective as not to pass the title against purchasers from B, and B being insolvent and about to dispose of the property, A could enjoin him from so doing. *Frank v. Peyton*, 82 Ky. 150.

(11) **Trespass.** An injunction will lie to "restrain a trespass if the threatened trespass will destroy the very substance of the estate 'in the character in which it has been enjoyed,' or if so permanent and continuous that it can never be said to be complete so that the injury can be computed; or if the injury can not be estimated in money; or if so vexatiously persisted in that a multiplicity of suits must result; or if committed by one who is insolvent and against whom a verdict will be valueless." But to maintain an injunction for trespass the plaintiff must be in the actual possession of the land. *Hillman v. Hurley*, 82 Ky. 626; see further as to enjoining trespasses, *Musselman v. Marquis*, 1 Bush 463; *Peak v. Hayden*, 3 Bush 125; *Ellis v. Wren*, 84 Ky. 254; *O'Hara v. Johns*, 7 R. 296; *Preston v. Preston*, 85 Ky. 16.

§ 273. **Officers who may grant.** The injunction may be granted at the commencement of the action, or at any time before judgment by the court, or by any circuit judge, or by the clerk of the court, or the county judge if the judge of the court be absent from the county, or by two justices of the peace if the judge and the clerk of the court and the county judge be absent from the county. No injunction shall be granted by any of the foregoing officers, unless it appear from the affidavit of the party applying therefor that it has not been refused by the court; nor shall such injunction be granted by a clerk or county judge or justice unless it appear from such affidavit that it has not been refused by the court or any circuit judge. No injunction or temporary restraining order shall be granted until after the petition seeking the injunction shall be filed. No injunction or temporary restraining order shall be granted by any circuit or other judge of similar jurisdiction in any action pending outside of the circuit or county wherein such judge shall preside, unless it shall appear from the affidavit of the plaintiff that there is no circuit or other judge of similar jurisdiction present at the time in the county where the action is pending. (*Sec. as amended by act 1894.*)

§ 274 ⁽³⁰²⁾ **Granted before judgment—court may control.** Injunctions granted before judgment shall be subject to the further order of the court.

§ 275 ⁽³⁰⁴⁾ **Defendant who has answered to be notified.** An injunction shall not be granted against a defendant who has answered, unless he have had notice of the application therefor.

§ 276 ⁽³⁰⁵⁾ **Notice of application for—when not required.** An injunction shall be granted only upon reasonable notice, in writing, to the party sought to be enjoined, of the time and place of the application therefor, and of the court or officer to whom the application is to be made. Where the court or officer to whom the application for an injunction is made shall be satisfied by the facts set forth in the affidavit of the applicant, or by other evidence, that irreparable injury will result to the applicant from the delay of giving notice, the court or officer may enter a temporary order restraining the act or acts sought to be enjoined, or it may be mandatory in its nature, if the case so require, except that no mandatory restraining order shall be entered by any clerk, county judge or two justices in any case. Such restraining order shall in no case be granted until the applicant shall have given bond, as prescribed by subsection three of section

(12) Waste may be restrained. Ky. Stat., sec. 2336.

tion is not final. Dulaney v. Murphy, 12 R. 688.

274. Order refusing temporary injunc-

two hundred and seventy-eight of the Civil Code, and a copy of the order shall be forthwith served upon the party or parties sought to be enjoined. The restraining order, if made by the court, or any circuit or other judge of similar jurisdiction, shall set forth a reasonable place and time, not to exceed ten days from the day upon which the order is made, at which the applicant shall move the court or judge to grant the injunction; and the order shall remain in force until the motion is heard and determined, but not for a greater length of time than ten days after the day fixed in the order for hearing the application. Such motion for injunction shall be tried as provided in this Code for the trial of applications for injunctions of which notice has been given in the first instance. The restraining order, if made by the clerk of the court, the county judge or two justices of the peace, shall remain in force until set aside or modified, or until the injunction is granted as provided in section two hundred and ninety of the Civil Code as amended by this act. (*Sec. as amended by act 1894.*)

§ 277 ^[304] **Affidavit may be read on application for.** On the hearing of an application for an injunction, of which notice has been given, each party may read affidavits. (*How and before whom affidavit made, secs. 551, 549.*)

§ 278 ^[307] **Bond to obtain—requisites of.** 1. If an injunction be granted to stay proceedings upon a levy made under an execution, and the party applying for the injunction desire to discharge the levy, he shall execute a bond to the effect that he will satisfy the execution to the extent to which the injunction may be dissolved; not exceeding the value of the property released; and upon the execution of such bond, and the issuing of the injunction, the levy shall be discharged.

§ 278. (1) **Injunction bond—execution levy.** An injunction bond to the effect that if the injunction is dissolved, the plaintiff will have the property levied on, or its value forthcoming to satisfy the order of the court, does not release the execution levy. A bond to satisfy the execution in the event the injunction is dissolved is the bond that discharges the levy, and the remedy in such a case is on the bond, and not by the sale of the property levied on. *Mallory v. Dauber, 83 Ky. 239.*

(2) Where an execution has been stayed by injunction and bond executed as provided in subsec. 1, the effect of it is to

release the levy and discharge the lien created thereby, and it is the duty of the officer handling the execution to restore the property levied on to the defendant. *Keith v. Wilson, 3 Met. 202; Lockridge v. Biggerstaff, 2 Duv. 281.*

(3) When the levy of an execution against a debtor who has ample property to satisfy it is enjoined and, pending injunction, property is so diverted that debt can not be made, sureties on bond are liable for amount of execution. *Moore v. Wilson, 1 R. 351.*

(4) In action on bond it is immaterial whether the property released from levy by execution of bond was subject to the

If he do not desire to release the levy, he may execute a bond to the effect that, upon a dissolution of the injunction, in whole or in part, he will have the property, or its value, forthcoming and subject to the order of the court; and, upon the execution of such bond, and the issuing of the injunction, the property levied on shall be delivered to him. For the purpose of ascertaining the value of the property, it shall be appraised as directed in section two hundred and fifteen.

2. If such injunction extend further than the stay of proceedings upon the levy, the party shall give such additional bond as the court, judge or officer granting the injunction may direct.

3. In all other cases, the court, judge or officer granting the injunction shall, in the order granting it, fix the amount of the bond to be given, and may prescribe its terms. If the terms of the bond be not so prescribed, it shall be to the effect that the party giving it will pay to the party enjoined such damages as he may sustain, if it be finally decided that the injunction ought not to have been granted.

4. If the injunction be to stay proceedings upon a judgment, the amount of the bond shall be sufficient to cover, with other damages, the sum of money for which judgment was rendered, with five years' interest thereon, and the rent, hire or value of the use, for two years, of property for which judgment was given; and, in case of personal property, its value also. (*Form of bond, page 636 ; if defective, new one may be executed, sec. 682.*)

§ 279 [308] **Bond must be executed before order issues.** The order of injunction shall not be issued by the clerk until a bond, as is required by section two hundred and seventy-eight, with good surety of the party obtaining the injunction, shall have been executed in his office. (*Sureties may be sworn, qualifications of, secs. 683, 684 ; when may issue on holiday, sec. 665.*)

execution or whether plaintiff has lost his debt by reason of the injunction. *Riggan v. Crain*, 86 Ky. 249.

§ 279. (1) **Action on bond—damages recoverable.** An action can not be maintained upon an injunction bond until there has been a final judgment in the case in which the bond is given. *Wood v. Laycock*, 3 Met. 193.

(2) The dismissal of the petition is a judicial determination that the injunction ought not to have been granted, and a cause of action at once arises upon the bond. *Pugh v. White*, 78 Ky. 210; and

(11)

so if final judgment dissolving injunction is rendered either in State court or United States court to which action has been transferred. *Alexander v. Gish*, 88 Ky. 13.

(3) In all cases except where proceedings upon a judgment have been stayed, the remedy is on the injunction bond, and no assessment of damages by the court upon the dissolution of the injunction is necessary. When a judgment has been stayed, the judge is empowered to assess the damages. *Logsdon v. Willis*, 14 Bush 183; *Rankin v. Estes*, 13 Bush 428.

§ 280 ^[309] **Sureties in bond to be accepted by clerk.** Sureties in injunction bonds shall be accepted by the clerk under the same responsibilities as in other cases of sureties accepted by him.

§ 281 ^[310] **Order of injunction—requisites and service of.** The order of injunction shall be addressed to the party enjoined; shall state the injunction; and, if its effect be to discharge a levy under an execution, it shall so state; and shall be dated and signed by the clerk. If it be issued at the commencement of an action, it shall be indorsed upon the summons, and a copy thereof shall be delivered to the sheriff. If it be issued during the litigation, it shall be delivered to him, with as many copies thereof as there are parties enjoined. The sheriff shall forthwith serve it by delivering a copy to each party enjoined, and make return thereof on the order. (*Form of order, page 637; what officers may execute, sec. 667; when may execute on holiday, sec. 665; must indorse time of reception, sec. 674.*)

§ 282 ^[311] **Service of order when unnecessary—party when bound.** If notice of the application for an injunction have been given to the party sought to be enjoined, it shall not be necessary to serve the order upon him; he is bound by the injunction as soon as the bond required of the adverse party is executed.

§ 283 ^[312] **When binding on defendant.** An injunction binds the party from the time he is informed thereof. (*See sec. 282.*)

§ 284 ^[313] **Judgment that can not be enjoined.** No injunction shall be granted to stay proceedings upon a judgment of a justice of the peace, or of a county court, if the value of the matter in dispute do not exceed twenty-five dollars.

§ 285 ^[314] **Judgment to be enjoined in court rendering.** An injunction to stay proceedings on a judgment shall not be granted, in an action

(4) In an action upon an injunction bond the plaintiff can only recover such damages as resulted to him from the operation of the injunction; he can not recover the costs and expense incurred in defending the action in which the injunction was obtained and which were not occasioned by the injunction. *Burgen v. Sharer*, 14 B. M. 497.

(5) **Attorney fees.** Where the injunction is merely in aid of the relief sought, or is relied on to secure the relief when obtained or to prevent the commission of an act that would result in injury before termination of action, attorney fees may be recovered, but where the injunction is the relief sought, and in fact gives the

relief if sustained, attorney fees can not be recovered. *New Nat. T. P. Co. v. Dulaney*, 86 Ky. 516.

(6) **Numerous parties.** One or more may sue upon bond for benefit of all. 88 Ky. 13.

§ 283. **Parties bound by injunction.** Injunctions do not interfere with the rights of third parties who have acquired them in good faith, and who are not parties or privies to the proceedings. They must be respected while in force, although improperly granted, but bind only parties and privies. *Roberts v. Davidson*, 83 Ky. 279.

§ 285. (1) **Judgment—in what court to be enjoined.** An injunction to stay proceedings upon a judgment can only be

brought by the party seeking the injunction, in any other court than that in which the judgment was rendered. Nor shall such injunction be granted, unless the party applying therefor make affidavit that no injunction has been previously granted to stay the proceedings on such judgment.

§ 286. **Disobedience of—how punished.** Disobedience of an injunction may be punished by the court, or by the judge thereof, or any circuit judge in vacation, as a contempt. Where the case has been appealed such disobedience may be punished by the Court of Appeals, or by any judge thereof during a vacation, recess or adjournment of said court. Upon production of evidence by affidavit of the breach of an injunction, the court, or any judge thereof during vacation,

granted in the court rendering it; this rule applies to justice's as well as to circuit courts, and a judgment in a justice's court must be enjoined in that court, although by reason of accrued interest it exceeds the jurisdiction of the court. *Davis v. Davis*, 10 Bush 274.

(2) The circuit court has no jurisdiction to enjoin the sale of property under an execution upon a judgment rendered in a justice's court. *C. & O. R. R. Co. v. Reasor*, 84 Ky. 369; or quarterly court, *McConnell v. Rowe*, 8 R. 343.

(3) Where a judgment upon a note given for land is rendered in the quarterly court, a petition for an injunction must be filed in that court; the case can then be transferred to the circuit court if the title to the land is involved. *Kelly v. Kelly*, 2 Duv. 363.

(4) The provision that an injunction to stay proceedings on a judgment must be brought in the court in which the judgment was rendered applies not only to the party against whom the judgment was rendered, but to all who seek to enjoin it. *Mallory v. Dauber*, 83 Ky. 239.

(5) When an execution issues on a judgment in the quarterly court and is returned "no property found," and an execution is then obtained from the circuit court on a transcript filed in that office, an action to enjoin the collection of the execution must be filed in the quarterly court. *Neeters v. Clements*, 12 Bush 359.

(6) The Louisville Chancery Court has no authority to grant an injunction to stay proceedings on a judgment of the Jefferson Court of Common Pleas. *Mallory v. Dauber*, 83 Ky. 239.

(7) Judgment rendered on process executed by the sheriff in an action in which he is plaintiff is a nullity, and may be enjoined. *Knott v. Jarboe*, 1 Met. 504.

(8) On enjoining a judgment in favor of a non-resident it is not necessary to execute the bond required by sec. 410. *Fellows v. Day*, 5 Bush 666.

(9) A judgment can not be enjoined, although the debt upon which it was rendered may have been paid before the rendition of the judgment; payment is a good legal defense and should have been made to the action on the note. *Lillard v. Turner*, 16 B. M. 374.

(10) See section 17 and notes thereto, and *McCown v. Macklin*, 7 Bush 308.

(11) **Void judgment** may be resisted in any court in which it is attempted to be enforced, and not merely in court which rendered it. *Stevens v. Deering*, 10 R. 393; *Spencer v. Parsons*, 89 Ky. 577.

§ 286. (1) **Disobedience of Injunction.** Violation of an injunction pending an appeal from judgment perpetuating injunction is a contempt of the Appellate court and punishable. *K. & I. Bridge Co. v. Krieger*, 91 Ky. 625.

(2) A common carrier can not excuse its violation of an injunction upon the ground that its duty to the public demanded such violation. 91 Ky. 625.

may proceed by rule and attachment against the party committing the breach, who may introduce like evidence in his behalf. Should the party be held to be in contempt, unless he purge the contempt, the judge in vacation may commit him to jail until the sitting of the court, or take a bond with security for his appearance to answer for the contempt at the next term of the court, and, in the meantime, to obey the injunction. (*Sec. as amended by act 1894.*)

§ 287 [317] **Affidavits read on application, to be filed.** Affidavits read upon an application for an injunction shall be filed with the papers of the case.

§ 288 [318] **Surety in bond—additional may be required.** A party enjoined may, at any time before judgment, after reasonable notice to the adverse party, move the court for additional security; and, if it appear on such motion that the surety in the injunction bond has died or removed from this State, or is insufficient, the court may vacate the order of injunction, unless in a reasonable time sufficient security is given.

ARTICLE 2.

DISSOLUTION AND REINSTATEMENT OF.

§ 289. *This section was repealed by act 1894.*

§ 290. **Motion to dissolve or modify.**

§ 291. **Motion to dissolve or modify after answer.**

§ 292. **Postponement of motion—grounds for.**

§ 293. **Disposition of motion by the court.**

§ 294. **Only one motion to dissolve or modify allowed.**

§ 295. **Assessment of damages on dissolution.**

§ 296. **Time allowed for reinstatement.**

§ 297. **Appellate judge may dissolve, modify or reinstate.**

§ 289. *This section was repealed by act of 1894.*

§ 290. **Motion to dissolve or modify—notice—evidence.** A motion to dissolve or modify an injunction, or to set aside or modify a restraining order, granted by the clerk of the court, the county judge or two justices of the peace, may be made before the court, or any circuit or other judge of similar jurisdiction, who is competent to grant an injunction in the case under section two hundred and seventy-three of the Civil Code, at any time after reasonable notice, in writing, to the plaintiff or applicant for the injunction or restraining order of the time and place of the motion and of the judge before whom it is to

be made. Upon the hearing of such motion, either party may read affidavits, and the court or judge shall, within ten days from the hearing, sustain or overrule the motion to dissolve or modify the injunction, or shall set aside or modify the restraining order, or grant an injunction in lieu of the same, as the case may require, and shall try either of such motions as if it were an application for an injunction *de novo*. The order of the judge overruling the motion to dissolve or modify an injunction, or dissolving or modifying an injunction; or setting aside or modifying a restraining order, or granting an injunction, with the notice, shall be returned to the office of the clerk of the court, and the order obeyed as if made by the court. (*Sec. as amended by act 1894.*)

§ 291 [321] **Motion to dissolve or modify after answer.** After answer filed by the party enjoined, he may give notice to the plaintiff of a motion to be made to the court, in not less than ten days thereafter, upon the whole case, to dissolve or modify the injunction. Upon such motion, each party may read depositions and other competent evidence in writing. The court shall not be bound to take the answer as true. (*Person on whose affidavit injunction granted may be examined, sec. 548.*)

§ 292 [322] **Postponement of motion—grounds for.** The motion, upon the whole case, to dissolve or modify the injunction, may be postponed, on the application of either party, to a subsequent day, or to the next term, if the court be satisfied that, under the circumstances of the case, the delay is proper. If delay be asked in order to obtain the testimony of a witness, it must appear by affidavit what facts the witness is expected to prove, that the affiant believes his testimony will be true, and that it could not have been obtained by due diligence.

§ 293 [323] **Disposition of motion by court.** After hearing the motion, the court or judge shall overrule it, or dissolve or modify the injunction, according to the right of the case.

§ 291. (1) **Notice of motion to dissolve** injunction made during regular term of court is not necessary. *Williams v. Cooper*, 14 R. 284.

(2) **Preliminary order dissolving.** When a motion is made, after answer is filed, to dissolve an injunction on the whole case, the court, instead of rendering a final judgment on the motion, should enter an order overruling or sustaining the motion, and on final hearing dispose of the case on its merits. *Simrall v. Grant*, 79 Ky. 435. An order dissolving

an injunction on motion is not final, and can not be appealed from. The remedy is to apply to have it reinstated, as provided in secs. 296, 297. *Rodman v. Forline*, 2 Met. 325.

§ 293. (1) **Appeal with supersedeas** from judgment perpetuating an injunction does not have the effect to dissolve or suspend the injunction. *K. & I. Bridge Co. v. Krieger*, 91 Ky. 625.

(2) **Judgment dissolving may be superseded.** Where on final hearing an injunction has been dissolved, the execution of

§ 294 [324] **Only one motion to dissolve or modify allowed.** Only one motion to dissolve or modify an injunction, upon the whole case, is allowed.

§ 295 [325] **Assessment of damages on dissolution.** Upon the dissolution, in whole or in part, of an injunction to stay proceedings upon a judgment, the damages shall be assessed by the court; which may hear the evidence and decide in a summary way, or may, at its discretion, cause a jury to be impaneled to find the damages. If the collection, payment or use of money be enjoined, the damages may be any rate per cent on the sum released by the dissolution, which, in the discretion of the court, may be proper, not exceeding ten per cent. And, if the delivery of property have been delayed by the injunction, the value of the use, hire or rent thereof shall be assessed; judgment shall be rendered against the party who obtained the injunction for the damages assessed; and the assessment shall be conclusive against the surety of such party.

§ 296 [326] **Time allowed for reinstatement.** 1. If the plaintiff desire to apply for a reinstatement of an injunction dissolved or modified, on

a supersedeas bond by the plaintiff and the service of an order of supersedeas leaves the injunction in full force, and the defendant will be guilty of contempt if he disregards it. *Smith v. Western Co.*, 83 Ky. 269; *E. R. R. Co. v. Ashland R. R. Co.*, 94 Ky. 748.

(3) Judgment dissolving injunction and dismissing petition is final, although it did not in terms dispose of a counterclaim filed by defendant. *E. R. R. Co. v. Ashland R. R. Co.*, 94 Ky. 478; and where injunction is dissolved upon final hearing the remedy is by appeal of the whole case. *Pendergest v. Heekin*, 94 Ky. 384.

§ 295. (1) **Assessment of damages.** It is only where proceedings on a judgment have been enjoined that the chancellor, immediately upon the dissolution of the injunction, is empowered to ascertain the damages and render judgment for them. In all other cases, the remedy is on the bond. *Logsdon v. Willis*, 14 Bush 183; *Rankin v. Estes*, 13 Bush 428; *Alexander v. Gish*, 88 Ky. 13.

(2) In order to give a remedy upon an injunction bond executed to stay proceedings on a judgment the court must assess

the damages, otherwise the party is without remedy. *Hayden v. Phillips*, 89 Ky. 1.

(3) The provision that the damages assessed upon the dissolution may be at any rate per cent not exceeding ten, in the discretion of the court, is not arbitrary, and the chancellor may give nominal damages. *Mallory v. Dauber*, 88 Ky. 239.

(4) The amount of money or value of the property enjoined is not estimated in determining the question of damages on the dissolution, as that liability is fixed by the original judgment. The court is called on only to ascertain the special damages sustained by reason of the injunction; and the party against whom the injunction has been obtained must by motion have the damages assessed when the injunction is dissolved. If the court does not assess the damages, none can be recovered on the bond. *Crawford v. Woodworth*, 9 Bush 745.

(5) Costs of defendant in action when injunction is dissolved may be recovered in action on bond. 89 Ky. 1.

§ 296. **Application of section.** Sections 296 and 297 apply to the dissolution of

motion, the court or judge shall make the order of dissolution to take effect in a reasonable time thereafter, not exceeding twenty days, and shall express in the order that the plaintiff has leave to apply in the meantime for a reinstatement of the injunction.

2. Where an injunction has been granted or continued by any interlocutory order or decree, the party enjoined may, within twenty days from the entry of such order or decree, apply to a judge of the Court of Appeals for a dissolution or modification of the injunction. (*Sec. as amended by act 1894.*)

§ 297. **Appellate judge may dissolve, modify or reinstate.** A judge of the Court of Appeals, if the plaintiff have secured the right to apply for a reinstatement of an injunction, or if the party enjoined move to have the injunction dissolved or modified, may, upon a presentation of a copy of the record, including the evidence read, or offered to be read, upon the motion to dissolve or modify the injunction, reinstate the same in whole or in part, or may dissolve or modify the injunction. The plaintiff in the application shall give reasonable notice, in writing, of the time and place of the application for reinstatement of the injunction, or of the motion to dissolve or modify, and of the judge to whom it is to be made, to the party affected thereby. If the order of reinstatement be filed in the clerk's office in the time limited as provided in section two hundred and ninety-six, subsection one, the injunction, as reinstated, shall be obeyed, otherwise the order of dissolution or modification shall take effect. And if the order dissolving or modifying the injunction be filed in the clerk's office in the time limited as provided in section two hundred and ninety-six, subsection two, the order of dissolution or modification shall take effect, otherwise the injunction shall remain in force. (*Sec. as amended by act 1894.*)

injunctions in advance of rendition of final judgment. *Pendergest v. Heekin*, 94 Ky. 384.

§ 297. **Mandate—operation of can not be de-**

feated. The chancellor can not, before entering the mandate, suspend, by an injunction, his power to act in obedience to it. *Watson v. Avery*, 3 Bush 635.

CHAPTER V.

RECEIVER.

§ 298. Court may appoint—appeal from order.

§ 299. Mortgaged property to take charge of.

§ 300. Persons not to be appointed.

§ 301. Oath and bond of receiver.

§ 302. Powers of receiver.

§ 298 ⁽³²⁰⁾ **Court may appoint—appeal from order.** On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed or materially injured, the court, or the judge thereof during vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him. The order of a court, or of the judge thereof, appointing or refusing to appoint a receiver, shall be deemed a final order for the purpose of an appeal to the Court of Appeals: *Provided*, That such order shall not be superseded.

§ 298. (1) **Action against receiver** can not be brought without leave of court by which he was appointed. *Spalding v. Com.*, 88 Ky. 135.

(2) **Appointment of—powers.** In an action under the act of 1856, the statute does not authorize the appointment of a receiver, except to take charge of property in the possession, or under the control, of the transferee, or the person to whom the conveyance is made; and there is no law authorizing a receiver to take charge of property in the possession of the transferor, until it has been first adjudged that the conveyance operated as an assignment. *Griffith v. Cox*, 79 Ky. 562.

(3) When a receiver has been appointed and is in possession, his possession is the possession of the court, and may not be disturbed without leave of the court; nor will the court, without its sanction be first obtained, permit any one to intercept or prevent payment to its receiver of anything which he has been appointed to receive, although it may not

be actually in his hands. *Hazelrigg v. Bronaugh*, 78 Ky. 62.

(4) Under section 299 a receiver may be appointed to preserve the property, but not to sell it. *Wilson v. A. & T. Co.*, 91 Ky. 299.

(5) See further, Kentucky Statutes, sec. 392, as to receivers.

(6) **Liability for funds.** The receiver of a fund having loaned it to a firm of which he was a member, the other members of the firm are liable, although the money was repaid to the receiver by the firm. *Ryan v. Morrill*, 83 Ky. 352.

(7) **Not allowed to derive profit from funds.** A receiver will not be permitted to speculate in, or derive any profit or benefit from, the purchase of property under his control or in his hands; and any purchase or profit so made will inure to the benefit of the parties in interest. *Titherington v. Hodge*, 81 Ky. 286.

(8) **Order refusing to appoint receiver** is final and may be appealed from. *Leavell v. Poore*, 91 Ky. 321.

§ 299 [330] **Mortgaged property to take charge of.** In an action by a mortgagee for the sale of the mortgaged property, a receiver may be appointed, if it appear that the property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

§ 300 [330] **Persons not to be appointed.** Excepting personal representatives, guardians, curators and committees of persons of unsound mind, neither a party to an action, nor his attorney, nor any person interested therein, shall be appointed receiver.

§ 301 [331] **Oath and bond of receiver.** Before entering upon his duties, the receiver must be sworn to perform them faithfully; and, with one or more sureties approved by the court or judge, must execute a bond to such person and in such sum as the court shall direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

(9) **Practice on appeal**—On appeal from an order granting a motion to appoint a receiver, the evidence heard on such motion, whether oral or by deposition, may be embodied in a bill of exceptions. *Goldsmith v. Fechheimer*, 16 R. —.

(10) **Sheriff's sureties** are not liable for money collected by him as a receiver appointed by the court. *Heeter v. Jewell*, 6 Bush 510.

(11) **Taxation of funds** in hands of—circuit court should direct receiver to list property and pay taxes. 88 Ky. 135.

§ 299. (1) **Appointment in discretion of court.** The appointment of a receiver is a matter of sound legal discretion, to be made or refused on the circumstances of each particular case. *Douglass v. Cline*, 12 Bush 608; and see 16 R. 432.

(2) A receiver may be appointed when the title to land is involved, or there is a proceeding to enforce a lien, and the party in possession claiming title is insolvent and is committing waste, or when the plaintiff is entitled to the rents under his contract and the party in possession is insolvent and the property insufficient to pay the claim. *Collins v. Richart*, 14 Bush 621; *Hounshell v. Insurance Co.*, 81 Ky. 304.

(3) **Bond.** A receiver appointed to collect debts due an estate, being ruled to

report, in order to get time, executed a new bond for the faithful performance of his duties; the sureties in this bond were held liable for the money ascertained to have been in his hands when the bond was given. *Rowlett v. Eubank*, 1 Bush 477.

(4) Although no statute authorizes a general receiver to be appointed by the court, if for convenience the receiver by the consent and approval of the court shall execute a general bond, it will be good as a common law obligation and the sureties bound for the acts of the receiver under it. *Ellis v. Carr*, 1 Bush 527; see further, Ky. Stat., sec. 392.

(5) **Construction of section.** In a suit to enforce a mortgage lien the court has no power to order a sale of the mortgaged property in advance of a decision upon the merits, and can only appoint receiver to preserve, not to sell the property. *Wilson v. A. & T. Co.*, 91 Ky. 209.

(6) **Mortgaged property—rents.** In an action to enforce a mortgage lien, when it appears that the condition of the mortgage has been broken, and that the property is probably insufficient to discharge the mortgage debt, a receiver may be appointed to take charge of the property, and in this way the rents and profits arising from it may be secured for the benefit of the mortgagee. *Douglass v.*

§ 302 ^[332] **Powers of receiver.** The receiver has, under the control of the court, power to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts and generally to do such acts respecting the property as the court may authorize. (*May sue in his own name, sec. 21.*)

CHAPTER VI.

DEPOSIT IN COURT.

- § 303. Deposit of money or property may be ordered.
- § 304. Court may enforce order.
- § 305. Sheriff may be directed to keep property—costs.
- § 306. Sheriff may be directed to keep money.
- § 307. Money may be placed in bank.
- § 308. Money may be loaned.

§ 303 ^[333] **Deposit of money or property may be ordered.** If a party admit by his pleading, or upon examination, that he has in his possession, or under his control, any money, or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or to be delivered to the party who is thus admitted to be entitled thereto, with or without security, subject to the further order of the court.

§ 304 ^[334] **Court may enforce order.** If, in the exercise of its authority, a court order the deposit or delivery of money or other thing, and the order be disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it in conformity with its direction.

§ 305 ^[335] **Sheriff may be directed to keep property—costs.** The court may

Cline, 12 Bush 608; N. & C. Bridge Co. v. Douglass, 12 Bush 673; Woolley v. Holt, 14 Bush 788; Taliaferro v. Gay, 78 Ky. 496.

§ 302. (1) **Powers of receiver.** A receiver can not bring an action involving the title to real estate, or submit a controversy concerning real estate to arbitration and bind without their consent the parties in interest by the judgment which may be rendered. Caldwell v. McWhorter, 84 Ky. 130.

(2) A receiver has no right to retain funds collected by him, and pay with his individual claims against the party

to whom he is directed to pay money, the amount due to him. The possession of funds collected by the receiver is the possession of the court. Johnson v. Gunter, 6 Bush 534; see further, notes to sec. 298.

§ 303. **Clerks not authorized** to receive money on replevin bonds, judgments or executions, and the sureties in the bond of the clerk are not liable for his failure to pay over money thus received by him. Hardin v. Carrico, 3 Met. 290; Chinn v. Mitchell, 2 Met. 92; Durant v. Gabby, 2 Met. 91.

direct the sheriff to keep safely any property delivered to him pursuant to the provisions of this chapter; and may allow him the necessary expenses attending the same, to be paid by such party as the court shall direct, and taxed in the costs of the action.

§ 306 [335] **Sheriff may be directed to keep money.** It may confide to the sheriff money deposited or paid into court—which shall be kept by him under the same requirements and responsibilities of himself and his sureties as are provided by this Code in respect to money deposited in lieu of bail.

§ 307 [337] **Money may be placed in bank.** A court sitting in a county in which, or in any county adjoining which, there is a bank, or a branch of a bank, created by the laws of this State, or of the United States, transacting regular banking business, may order money paid into court to be deposited in such bank or branch, to the credit of the court in the action or proceeding in which the money was paid. Money so deposited shall be paid only upon the check of the clerk of the court, annexed to its certified order for the payment, and in favor of the person to whom the order directs the payment be made.

§ 308 [339] **Money may be loaned.** Money deposited or paid into court, in an action, shall not be loaned by the court, unless with the consent of all the parties having an interest therein or making claim thereto; or, unless the party moving to have it loaned, execute a bond to the Commonwealth of Kentucky, with good surety, to be approved by the court, for the benefit of the parties interested, conditioned that the borrower of the money will pay it according to the contract of loan.

TITLE IX.

TRIAL AND JUDGMENT.

- CHAPTER I. ISSUE, 309.
- II. TRIAL, 311.
1. TRIAL IN GENERAL, 311.
 2. TRIAL BY JURY, 316.
 3. TRIAL BY COURT, 331.
 4. EXCEPTIONS, 333.
 5. NEW TRIAL, 340.
 6. GENERAL PROVISIONS, 345.
 7. TIME OF TRIAL, 347.
- III. JUDGMENT, 368.
1. JUDGMENT IN GENERAL, 368.
 2. UPON FAILURE TO PLEAD, 379.
 3. JUDGMENT BY CONFESSION, 381.
 4. MANNER OF GIVING AND ENTERING, 384.
 5. CONVEYANCE BY COMMISSIONER UNDER, 394.
- IV. REVIVOR OF JUDGMENTS, 401.

CHAPTER I.

ISSUE.

§ 309. Definition—two kinds.

§ 310. Issue of fact—when arises.

§ 309 [339] **Definition—two kinds.** Issues arise on the pleadings when a fact, or conclusion of law, is maintained by one party and controverted by the other. They are—

1. Of law.
2. Of fact.

§ 310 [340] **Issue of fact—when arises.** An issue of fact arises—

1. Upon a traverse in an answer or other pleading of a material allegation in a petition or other pleading.
2. Upon an allegation of a pleading which is controverted by law. (*Traverse defined, sec. 113-7.*)

CHAPTER II.

TRIAL.

- ARTICLE 1. TRIAL IN GENERAL, 311.
2. TRIAL BY JURY, 316.
3. TRIAL BY THE COURT, 331.
4. EXCEPTIONS, 333.
5. NEW TRIAL, 340.
6. GENERAL PROVISIONS, 345.
7. TIME OF TRIAL, 347.

ARTICLE 1.

TRIAL IN GENERAL.

- § 311. Trial defined.
§ 312. Issues—how tried.
§ 313. Trial of fact by court.
§ 314. Order in which actions shall be tried.
§ 315. Postponement of trial.

§ 311 [341] **Trial defined.** A trial is a judicial examination of the issues of law or of fact in an action or proceeding.

§ 312 [342] **Issues—how tried.** 1. Issues of law must be tried by the court.

2. Issues of fact in ordinary actions, except for injuries to person or character, shall be tried by the court, unless a jury trial be demanded by a party. (*Court may try actions for injuries to person and character, sec. 331; court to state separately law and facts, sec. 332.*)

§ 313 [343] **Trial of facts by court.** All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury. (*As to transferring actions from equity to ordinary, and vice versa, and submitting issues to jury, see secs. 8 to 16.*)

§ 312. (1) **Judgment of chancellor.** As to the weight and effect of the judgment of the chancellor in a common law action, see note 1 to sec. 10.

(2) **Law and facts submitted to court,** admission of incompetent evidence not reversible error. *Andrews v. Hayden*, 88 Ky. 455.

(3) **Motion and grounds for new trial.** In a common law action when the law and facts are submitted to the court, a motion and grounds for a new trial are necessary in order to a review by the Court of Appeals of any alleged error committed during the trial; in the absence of a

motion and grounds for a new trial nothing is before the court except the inquiry as to whether the pleadings state any cause of action or defense, and whether the evidence authorizes the judgment. *Helm v. Coffey*, 80 Ky. 176; *Harper v. Harper*, 10 Bush 447; *Henderson v. Dupree*, 82 Ky. 678; and see sec. 340 and notes.

(4) **Practice.** Assessment of damages by the court. See notes to sec. 126; and see notes to secs. 11, 12, as to right to trial by jury.

§ 313. (1) **Submission of issue in chancery to a jury.** The courts of chancery

§ 314 (344) **Order in which actions shall be tried.** The trial of each action shall be according to the order in which it stands upon the docket, unless for good reason appearing the court shall order otherwise.

§ 315 (345) **Postponement of trial.** A motion to postpone a trial on account of the absence of evidence can be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it; and, if it be for an absent witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence; and that the affiant believes them to be true. If, thereupon, the adverse party will consent that, on the trial, the affidavit shall be read as the deposition of the absent witness, the trial shall not be postponed on account of his absence. (*When witness liable for cost of continuance, sec. 536.*)

have the power to order a matter of fact strongly controverted to be tried by a jury, and the issue thus tried may be formed on exceptions to a master's report. *Crabb v. Larkin*, 9 Bush 154; in *Horner v. Harris*, 10 Bush 357, the court say in such cases the issue to be tried should be presented by pleadings as in other cases; a party may present by petition his claim against a decedent's estate in an action to settle the estate, and in such case the adverse party should be required to controvert it by an answer. See further, notes to secs. 11, 12.

(2) In an equity action an order to the effect that the issue raised by the pleadings was referred to a jury is sufficient when there was only one issue presented. On the trial of an issue by a jury, oral evidence is admissible. *Savings Bank v. Benton*, 2 Met. 240; *McMakin v. Stratton*, 82 Ky. 226.

(3) **Trial by court.** In an equitable action the court, when a jury is not demanded, may determine the value of property wrongfully converted or attached. *Greer v. Powell*, 1 Bush 489. See further, notes to sec. 126.

(4) **Verdict—how regarded.** When in an equitable action an issue is on motion submitted to a jury, the verdict has the same effect as in ordinary cases, and especially is this the case when the parties prefer to have an issue tried by a jury. *Moore v. Sheperd*, 2 Duv. 125; and see *Hendrick v.*

Money, 1 Bush 306, and see note to secs. 11, 12.

§ 316. (1) **Affidavit for continuance.** The refusal to grant a continuance is not an abuse of discretion when the statement of what the absent witness will prove is admitted as evidence; a party has no right to a postponement to enable him to procure the attendance of a person not in his employ to assist his attorney on the trial of the case. *M. & L. R. Co. v. Herrick*, 13 Bush 122.

(2) **Affidavit for continuance** may be made by a person not a party to action if he is informed concerning and can state necessary grounds for continuance. *Hardesty v. Com.*, 88 Ky. 537.

(3) A party is not entitled to a continuance on account of the absence of a witness who lives in another county, unless he shows that he has paid or tendered the witness fees, or that the witness has waived the payment. *Thurman v. Virgin*, 18 B. M. 785; the Code of 1854, sec. 594, provided that a witness should not be obliged to attend a trial except in the county of his residence or an adjoining county. See secs. 534, 536 of this Code as to attendance of witnesses; and Ky. Stat., sec. 1734, as to fees.

(4) The defendant was not entitled to a continuance on account of an absent witness by whom he could prove that a witness who would testify for plaintiff was not present when the assault com-

ARTICLE 2.

TRIAL BY JURY.

- § 316. Formation of jury.
- § 317. Order of proceeding in trial.
- § 318. View of property or place by jury.
- § 319. Duty of jury and officer after submission.
- § 320. Admonition by court to jury.
- § 321. Information as to law or evidence after submission.
- § 322. Discharge of jury—causes for.
- § 323. Retrial of case when jury discharged.
- § 324. Verdict—manner of delivering—poll of jury.
- § 325. Verdict to be written and signed—clerk to read.
- § 326. Verdicts described and defined.
- § 327. Verdict—kinds that jury may find.
- § 328. Judgment if general and special inconsistent.
- § 329. Assessment of recovery by jury.
- § 330. Value of property and damages—assessment of.

§ 316 [346] **Formation of jury.** The general mode of summoning, impan-
neling, challenging and swearing the jury is not changed by this
Code. (*For provisions concerning, see Ky. Stat., sec. 2264.*)

§ 317 [347] **Order of proceeding in trial.** When the jury has been sworn,
the trial shall proceed in the following order, unless the court, for
special reasons, otherwise direct:

plained of in the petition occurred,
because he did not set out in his affidavit
what the plaintiff expected to prove by
his witness. *Slater v. Sherman*, 5 Bush
206.

(5) **Affidavit—amendment** of is not
permitted after court has expressed an
opinion, so the court held in *Singleton v.*
Carr, 1 Bibb 554; *Smalley v. Anderson*,
4 Mon. 367, but see *Com. v. Hourigan*, 89
Ky. 305, where it is held that in criminal
cases after a motion for a continuance is
overruled, court may allow amended
affidavit to be filed and motion renewed.

(6) **Amendment of pleading.** Grounds
of continuance, see sec. 136; and see
Watts v. McKenney, 1 Mar. 561; *Ewing*
v. Beauchamp, 4 Bibb 496; *Eldridge v.*
Duncan, 1 B. M. 101, holding that an
amendment entitling party to continu-
ance must be material, and not a mere
verbal one.

(7) **Error in overruling motion** for con-
tinuance is reversible. *McCarty v. Pat-*
ton, 3 J. J. M. 263.

(8) See notes to section 189 Criminal
Code where a number of cases are cited
on the question of continuance.

BURDEN OF PROOF.

§ 317. (1) **Argument—introduction of
evidence.** Where the court required a
party to introduce his evidence first by
ruling that he had burden of proof, and
after evidence was all in reversed its
ruling and gave adverse party conclusion
of argument, the error was prejudicial.
Party who has burden must introduce
his evidence first, and is entitled to con-
clude argument. *O'Connor v. Henderson*
Bridge Co., 95 Ky. 633; limiting argument
is matter in discretion of trial court.
L. & N. R. R. v. Earl, 94 Ky. 368; but to
prohibit counsel from arguing case to
jury is error. *Behune v. Caldwell*, 2
Bibb 76.

(2) **Alteration of note.** The burden of
explaining all alterations, erasures or
mutilations of a paper upon which a
liability is sought to be established is

1. The plaintiff must briefly state his claim and the evidence by which he expects to sustain it.

2. The defendant must then briefly state his defense and the evidence he expects to offer in support of it.

3. The party on whom rests the burthen of proof, in the whole action, must first produce his evidence; the adverse party will then produce his evidence. (*Who has burden of proof, sec. 526.*)

upon the holder. *Elbert v. McClelland*, 8 Bush 577; 13 Bush 397.

(3) **Burden of proof** is on party who would be defeated if no evidence was offered on either side. *Royal Ins. Co. v. Schwing*, 87 Ky. 410; 10 R. 883.

(4) **Contributory negligence**. Contributory negligence is purely a matter of defense, and as to it the burden is on the defendant. *Bogenschutz v. Smith*, 84 Ky. 330; *P. & M. R. R. Co. v. Hoehl*, 12 Bush 41.

(5) **Denial of concluding argument** to party who has burden of proof is a reversible error. *Royal Ins. Co. v. Schwing*, 87 Ky. 410; *Fireman's Ins. Co. v. Schwing*, 10 R. 883; *Crabtree v. Atchinson*, 93 Ky. 338; *Lucas v. Hunt*, 91 Ky. 279.

(6) **False imprisonment**—burden on plaintiff, and he has the right to conclude argument. *Duffy v. Casey*, 3 R. 334, and see *Lucas v. Hunt*, 91 Ky. 279.

(7) **Fraud and want of consideration**—plea of, places burden upon defendant. *Crabtree v. Atchinson*, 93 Ky. 338.

(8) **Infancy**. The general rule is that when a party relies upon a disability, such as infancy, the burden is upon him to establish it. *Murrell v. McAllister*, 79 Ky. 311.

(9) **Killing stock by railroad**. In an action against a railroad company for killing stock, when the plaintiff has proved the killing or it is admitted, the burden is upon the defendant as to the question of negligence, and the plaintiff, after the defendant has concluded its evidence upon this issue, has the right to introduce his evidence bearing upon it. *K. C. R. R. Co. v. Lebus*, 14 Bush 518; *L. & N. R. R. Co. v. Brown*, 13 Bush 475; *K. C. R. R. Co. v. Talbot*, 78 Ky. 621.

(10) **Malicious prosecution**. In an action

for malicious prosecution, the issue of probable cause or a general traverse does not place the burden upon the defendant. *Lucas v. Hunt*, 91 Ky. 279, overruling *Brown v. Morris*, 3 Bush 81; and see *Ullman v. Abrams*, 9 Bush 788.

(11) **No consideration—special consideration**. Plea of no consideration to written contract; burden is on defendant. *Andrews v. Hayden*, 88 Ky. 455; *Trustees v. Fleming*, 10 Bush 234; but where a special consideration is relied on, or the plaintiff undertakes to show what was the consideration, he assumes the burden. *Steadman v. Guthrie*, 4 Met. 147; *L. & N. R. R. v. Literary Societies*, 13 R. 5.

(12) **Non est factum**—plea of, places burden upon plaintiff to show execution of writing. *Andrews v. Hayden*, 88 Ky. 455.

(13) **Payment**. If the answer admits the execution of the note and pleads payment, the burden is on the defendant. *Clarkson v. White*, 3 B. M. 876.

(14) **Possession of note**. The mere possession of a promissory note not assigned is not *prima facie* evidence of ownership; and when the ownership is contested, the burden is on the holder to show that his possession is rightful. *Gano v. McCarthy*, 79 Ky. 409.

(15) **Possession—ownership**. Where the petition alleged that the plaintiff was the owner of a slave, and that she had been unlawfully taken from his possession by defendant, and the answer admitted the taking, denied the ownership and alleged that defendant was the owner, the burden of proof was on defendant. *Vance v. Nance*, 2 Met. 581.

(16) **Promissory note—denial of credit on**. When a payment indorsed on a note is relied on to defeat a plea of limitation, and the payment is denied, the burden of

4. The parties will then be confined to rebutting evidence, unless the court, for good reasons in furtherance of justice, permit them to offer evidence in chief.

5. When the evidence is concluded, but before the argument to the jury, either party may require the court to direct the jury to find a separate-general verdict with the general verdict [or to find

proving it is on the holder of the note. *Frazer v. Frazer*, 13 Bush 397.

(17) **Receipt executed by party**, if genuine, places the burden on him to avoid it. *The Addyston Pipe Co. v. Copple*, 94 Ky. 292.

(18) **Several issues**. On the trial of a case presenting several issues, that if tried singly would shift the burden, the court has a large discretion in prescribing order of proof, and as a general rule the plaintiff will be required to conclude his entire case on all issues; but as to any issue upon which burden would be on defendant if it was the only one presented, the plaintiff should be allowed to introduce testimony by way of rebuttal although in chief. *Andrews v. Hayden*, 88 Ky. 455; see further, sec. 526.

INSTRUCTIONS.

(1) **Abstract principles of law**. It is error to give instructions which contain mere abstract principles of law; as to say to the jury "that where there is a conflict in the testimony of witnesses, the one side being of an affirmative and the other of a negative character, the affirmative character of testimony is preferred and is entitled to the greater weight by the jury in making up their verdict." *Lou. Chem. Works v. Com.*, 8 Bush 170.

(2) **Assuming certain facts**. Instructions which assume the existence of certain facts that the jury have a right to determine, should not be given. *Murphy v. May*, 9 Bush 33; but an uncontradicted fact may be assumed in an instruction. *L. & N. R. R. v. Earl*, 94 Ky. 368; and the court may instruct the jury that certain material allegations of the pleadings which are not denied are true; but the allegations thus admitted should be pointed out in the instruction. *Hartley v. Hartley*, 3 Met. 57; *Becker v. Crow*, 7 Bush 198; *Tipton v. Triplett*, 1 Met. 570; *Allard v. Smith*, 2 Met. 297.

(12)

(3) **Compensatory damages**. Proper instructions as to. *Ky. Central R. R. v. Ackley*, 87 Ky. 278; *Ky. Central R. R. v. Gasteneau*, 83 Ky. 119.

(4) **Court not bound to instruct jury as to whole law** of case, but if it assumes to instruct on its own motion it should give all the law applicable. *Swope v. Schaffer*, 9 R. 160.

(5) **Credibility of witnesses**. It is error to give an instruction that jury are judges of the credibility of witnesses and of the weight to be attached to their evidence; but the court will not reverse on this ground if such an instruction was not prejudicial. *Transatlantic Ins. Co. v. Bamberger*, 11 R. 101; *Peoples v. Com.*, 87 Ky. 487; *Barnard v. Com.*, 10 R. 143; *Barnett v. Com.*, 84 Ky. 449.

(6) It is error to instruct the jury "that if they believe any witness has sworn falsely and knowingly to any material fact, they are bound, or have the right, to disregard all his testimony." The jury are the exclusive judges of the testimony. *Letton v. Young*, 2 Met. 558; *Hall v. Renfro*, 3 Met. 52.

(7) **Instructions to be in writing when requested**. The court instructed the jury orally, and one of the jury inquired if the instructions were in writing. The court replied they were not. Counsel for plaintiff then said he hoped they would be reduced to writing. Held the language used was equivocal, and not sufficient to apprise the court that written instructions were required. If a party desires written instructions, he should request the court to give them in writing. *Ferguson v. Fox*, 1 Met. 83.

(8) **Law to be decided by the court**. The court should decide all questions of law, and only submit the facts to the jury. *Maltus v. Shields*, 2 Met. 553.

(9) **Negligence—gross neglect—ordinary care—ordinary negligence**. Proper instruc-

a special verdict. If a special verdict be so required, the questions of law may be reserved by the court until after verdict, but] if a general verdict be required, either party may ask written instructions to the jury on points of law, which shall be given or refused by the court before the commencement of the argument to the jury.

6. The parties may then submit or argue the case to the jury. In the argument, the party having the burthen of proof shall have the conclusion and the adverse party the opening. If there be more than one speech on either side, or if several defendants having separate defenses appear by different counsel, the court shall arrange the relative order of argument. (*Words in brackets stricken out by act 1886; see amd. to sec. 327; who has burthen of proof, sec. 526; order of proof regulated by court, sec. 592.*)

§ 318 ⁽³⁴⁸⁾ **View of property or place by jury.** Whenever, in the opinion of the court, it is proper for the jury to have a view of real property

tions defining. *L. & N. R. R. v. McCoy*, 81 Ky. 403; *Needham v. L. & N. R. R.*, 85 Ky. 423.

(10) **Peremptory instruction.** When there is evidence tending to establish a matter in issue, the court should not grant a peremptory instruction, although the judge should be of the opinion that if the jury found adversely to the request for such instruction, he would be compelled to grant a new trial. *Buford v. L. & N. R. R. Co.*, 82 Ky. 286; *Thompson v. Thompson*, 17 B. M. 22; 11 Bush 265.

(11) To authorize an instruction as in case of a non-suit, it should appear that, admitting the testimony to be true, and every inference that is fairly deducible from it, the plaintiff has still failed to support his claim. *Shay v. R. & L. T. P. Co.*, 1 Bush 108.

(12) While it is usual for the defendant, in moving for a peremptory instruction, to do so upon the plaintiff's evidence alone, yet the court may, after all the evidence has been heard upon both sides, direct the jury to find for the defendant, if all the evidence is in his favor. *Wilsey v. L. & N. R. R. Co.*, 83 Ky. 511.

(13) If the court overrules a motion for peremptory instructions at conclusion of plaintiff's testimony, and afterward becomes satisfied that this was error, it may, upon conclusion of all the evidence, set

aside former ruling and instruct jury to find for defendant. *Nance v. Newport News R. R.*, 13 R. 554.

(14) The rule is, "that a party may move upon the evidence of his antagonist, assuming that evidence and every fact which it conduces to prove as true, and ask the court for a peremptory instruction; but he can not make such a motion on his own evidence alone, or on his evidence mingled with, or added to, that of the opposite party, unless his own evidence is composed of record, or uncontested unofficial documents or writings." *United Shakers v. Underwood*, 11 Bush 265.

(15) **Prominent facts.** Instructions should not be given which give prominence to certain portions of the evidence, when the whole of it should have been left to be considered and weighed by the jury. *Flood v. Pragoff*, 79 Ky. 607; *Stokes v. Shippen*, 13 Bush 180.

§ 318. **View of premises.** Court may permit jury to view place where an accident occurred, even after they have retired to consider their verdict, when the jury so request. *L. N. A. & C. R. R. v. Schick*, 94 Ky. 191; and see *Ky. C. R. R. v. Smith*, 93 Ky. 449; where it is held that where jury was sent to view premises at close of testimony it was not error to refuse to permit them to go at a particular time during trial.

which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

§ 319 [344] **Duty of jury and officer after submission.** When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court—subject to the discretion of the court to permit them to separate temporarily at night and at their meals. The officer having them under his charge shall not suffer any communication to be made to them, nor make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court; and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

§ 320 [350] **Admonition by court to jury.** If the jury be permitted to separate, either during the trial or after the case is submitted to them, they must be admonished by the court that it is their duty not to converse with, nor suffer themselves to be addressed by, any other person on any subject of the trial; and that, during the trial, it is their duty not to form or express an opinion thereon, until the cause is finally submitted to them.

§ 321 [352] **Information as to law or evidence after submission.** After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their counsel.

§ 321. (1) **Jury—how informed as to law or evidence after retiring.** After the jury have been instructed, and have retired for consultation, any information, written or oral, sent to them by the judge is a violation of the Code. *Goode v. Campbell*, 14 Bush 75.

(2) A jury may be allowed after retiring to return into court to inquire of a witness what he had testified to, or said, in any part of his testimony, and cross-examination would not be allowed. In rare cases a jury might, after retirement,

be permitted to re-examine a witness respecting a fact not before testified to, where the court is satisfied that probable injustice would otherwise be done, but in such case cross-examination would be proper. *Thompson v. Poston*, 1 Duv. 389.

(3) After the jury had retired, a witness who had testified was sent for by them, admitted into the jury room and re-examined without the knowledge or consent of the court or parties; held sufficient grounds for a new trial. *Luttrell v. M. & L. R. R. Co.*, 18 B. M. 201.

§ 322 [302] **Discharge of jury—causes for.** The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge; or, by consent of both parties; or, after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

§ 323 [303] **Retrial of cases in which jury discharged.** Cases in which the jury are discharged without making a verdict shall be tried again at such time as the court may direct.

§ 324 [304] **Verdict—manner of rendering—poll of jury.** When the jury have agreed upon their verdict, their names shall be called by the clerk and the verdict be rendered by their foreman. When the verdict is announced, either party may require the jury to be polled—which is done by the clerk or court asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out for further deliberation.

§ 325 [305] **Verdict to be written and signed—clerk to read.** The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made, whether or not it is their verdict. If any juror disagree, the jury must be sent out for further deliberation; but if no disagreement be expressed, and neither party require the jury to be polled, the verdict is complete and the jury discharged from the case. (*Provision when three-fourths of jury render, sec. 2268, Ky. Stats.*)

§ 326 [306] **Verdicts described and defined.** The verdict of a jury is general or separate-general [or special]:

§ 325. (1) **Verdict—sufficiency of.** The provision of the Code that the verdict shall be signed by the foreman is merely directory, and a motion to set aside a verdict because not signed comes too late after the jury has been discharged. *Berry v. Pusey*, 80 Ky. 166; and see further, notes to section 255 Criminal Code, as to manner of rendering verdict and correction of.

(2) Jury may return to their room and perfect their verdict if they have brought in an imperfect or irregular one. *Tarleton v. Briscoe*, 1 Mar. 67; or the judge may, if verdict is a substantial response to issue, correct informalities in it. *Worley v. Isbel*, 1 Bibb 247; *Crozier v. Gano*, 1 Bibb 257.

(3) Affidavits of jurors can not be received to impeach their verdict for misbehavior in themselves or their fellow

jurors. *Allard v. Smith*, 2 Met. 297; and if affidavits of jurors can be received to show that their verdict was not what they intended it to be, they should be received with great caution and the verdict remain unchanged unless the mistake is clearly made out. *Alexander v. Humber*, 86 Ky. 565.

(4) Verdict finding "for plaintiff the debt in the petition mentioned" is sufficiently certain. *Brannin v. Force*, 12 B. M. 509; or "for plaintiff." *Cooper v. Poston*, 1 Duv. 92; nor does surplusage in a verdict vitiate it. *Kouns v. Grayson*, 2 Bibb 237.

GENERAL VERDICT.

§ 326. (1) **Verdict—defects in pleading cured by.** Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which

1. A general verdict is that by which the jury pronounces generally, upon all the issues, for the plaintiff or for the defendant.

2. A separate-general verdict is the finding, upon any of the issues, in favor of the plaintiff or of the defendant.

[3. A special verdict is the finding of facts by a jury, as shown in their answers to questions submitted to them in writing.]
(*Words in brackets repealed by act 1886.*)

§ 327 (307) **Verdicts—kind that jury may find.** Unless otherwise directed, the jury may find a general, or a general and separate-general, verdict [or a special verdict, with or without a general] or a separate-general verdict; but the court may, without motion, or upon the motion of a party shall, direct the jury to find—

would have been fatal on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts, so defectively stated or omitted, and without which it is not presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict. *Drake v. Semonin*, 82 Ky. 291; *L. & P. Canal Co. v. Murphy*, 9 Bush 522.

(2) Where there is a total omission to state a cause of action, or some fact essential to the cause of action has been wholly omitted, the verdict will not cure the defect. *Bogenschutz v. Smith*, 84 Ky. 330; 82 Ky. 291. See further, note 10 to sec. 95.

(3) **Verdict is not a judgment.** The verdict is not a judgment, the court must render judgment upon it; and the court can not refuse to render judgment upon the verdict, upon proper notice and motion made after the expiration of the time to move for a new trial. *Fuqua v. Mullen*, 13 Bush 467.

(4) **Verdict—how construed.** When a question between A and B as to the ownership of a horse is submitted to a jury, and the verdict is that the property was owned by B, it will be regarded as meaning that B was the owner at the time of the levy. *Schweim v. Sims*, 2 Met. 209; and see *Noel v. Hudson*, 13 B. M. 205.

(5) **Verdict in absence of proof.** In an action for the value of work and labor, the jury have a right in the absence of all proof of the value of such labor to

find a verdict for the price of the work done is charged in the petition. *Baum v. Winston*, 3 Met. 127.

(6) In an action for assault and battery, where the defendant fails to answer, the jury may properly, without proof, render a verdict for the plaintiff for more than nominal damages. *Rogers v. Aulick*, 2 Duv. 419.

SEPARATE-GENERAL VERDICT DEFINED.

“The meaning of the expression ‘separate-general verdict’ is, that the verdict is *separate* as to the particular issue as distinguished from any other issue in the case, and *general* as to the particular issue. That is, it was intended to apply in cases where there is more than one issue. For instance, an action upon an alleged contract when the issues presented are—first, was the contract procured by fraud or duress? And, second, if it was so procured, and therefore voidable, was it subsequently ratified by the defendant after a full knowledge of the fraud and the removal of the duress? If, in such case, the jury should find a general verdict for the defendant, the court could not determine whether it was based upon the ground that the evidence authorized the conclusion that there was fraud or duress sufficient to invalidate the contract, or upon the ground that there was not evidence requisite to establish a ratification. The evidence might preponderate in favor of the conclusion that there was fraud or duress sufficient to invalidate the contract, but

1. A separate-general verdict, as to any issue; and with such finding the jury shall also return a general verdict; and, if the separate-general verdict be inconsistent with the general verdict, judgment shall be rendered pursuant to the former; or,

[2. A special verdict; and, on such finding, the jury shall return a special verdict only; and the court shall render judgment upon it.]

Amendment of May 15, 1866. So much of chapter two, title nine, of the Civil Code of Practice as authorizes and provides for a separate-general or a special verdict be, and the same is hereby, repealed: *Provided*, That the court in its discretion may direct the jury to find a separate-general verdict.

at the same time the evidence upon the issue of ratification might be such that the preponderance in favor of a ratification would be so overwhelming that the court should grant a new trial. If a separate-general verdict is asked for, the court shall grant it, and with it shall require the jury to return a general verdict. In such cases it is not only proper, but necessary, that the jury should be instructed by the court as to the law applicable to the particular issues to be found by the jury as fully as if there was only one issue in the case and a jury were required to find a general verdict thereon." *Witty v. C. & O. R. R. Co.*, 83 Ky. 21.

SPECIAL VERDICTS.

(1) **Special findings permissible.** In *Tinsley v. Ross*, 15 R. 44, special findings were submitted to the jury, and on their findings the court rendered judgment. In answer to the objection that the law permitting special findings had been repealed, and it was therefore error to submit them, the court held the objection not available as the judgment was correct.

Special findings—practice. When in an ordinary action both legal and equitable defenses are relied upon, the court may submit to the jury for its decision such matters of fact as are involved in the equitable issue, when such issue has not been transferred to the equity docket, and the finding of the jury in relation to the facts involved in the equitable issue

should be special, to enable the court to render such a judgment thereon as may be proper and equitable between the parties. *Petty v. Malier*, 15 B. M. 591.

(2) The finding of a jury on a special verdict as to the evidence will be treated like a general verdict, and will not be disturbed unless flagrantly against the evidence. *Empire Co. v. McIntosh*, 82 Ky. 554.

(3) When there is no evidence to support a special verdict, the court, instead of rendering judgment against, it should grant a new trial. *Casey v. L. & N. R. R. Co.*, 84 Ky. 79; *L. & N. R. R. Co. v. Brice*, 84 Ky. 298.

"The rule is imperative that the court shall direct the jury to find upon such issues or facts as are embraced by the motion or interrogatories, but the court may reject the form proposed by counsel and put the question or prescribe the mode of eliciting the special verdict according to its sound discretion." *Louisville R. R. v. Weams*, 80 Ky. 420.

(4) In directing a special verdict the court should confine the questions propounded to the controlling facts in the case and they should be such as to enable the court on the return of the verdict to apply the law and enter judgment without anything further from the jury; and where either party may be entitled to recover money, or where damages are to be assessed, the court should direct the jury to assess the amount of recovery. A special verdict is a finding of facts

§ 328 [300] **Judgment, if general and special inconsistent.** If a general and a special verdict be inconsistent, judgment shall be rendered pursuant to the latter. (*This sec. repealed by act 1886.*)

§ 329 [300] **Assessment of recovery by jury.** If, by a general verdict, either party be entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery.

§ 330 [300] **When jury to assess value of property and damages.** In actions for the recovery of specific personal property, the jury must assess its value, and the damages for the taking or detention of it, if their verdict authorize a judgment for the recovery or return of the property. (*Form of judgment, page 648 and sec. 388. Form of execution for specific property, page 638.*)

without reference to their relation to any issue. *Witty v. C. & O. R. R. Co.*, 83 Ky. 21; *Berry v. Pusey*, 80 Ky. 166; *Imperial Ins. Co. v. Kiernan*, 83 Ky. 468.

(5) **Special verdict to control.** Where special findings are directed, it should be to every fact necessary to make out a cause of action or defense; if they are complete they must control, and the court will not look to the general verdict or the instructions that may have been given to the jury. The questions of law may be reserved by the court until after verdict. *L. & N. R. R. Co. v. Brice*, 84 Ky. 298; *Adams v. L. & N. R. R. Co.*, 82 Ky. 603.

§ 328. **General and special verdict.** If a general and a special verdict are inconsistent, judgment shall be rendered pursuant to the latter, but the judgment should be rendered on the general verdict when the special findings are not inconsistent with the general verdict. A bill of evidence is not necessary to enable the court to determine whether or not a general and a special verdict are inconsistent. *Quaid v. Cornwall*, 13 Bush 601; see *Gailbraith v. Arlington Ins. Co.*, 12 Bush 29.

§ 329. **Jury to assess amount of recovery—exceptions to rule.** Questions of value and damages are questions of fact, and

as a rule in cases involving such questions the jury must assess the amount of recovery; but in an action on a note where the only defense was usury and verdict was, "we of the jury find for the plaintiff," a judgment for the amount of the note and interest was proper. *Cooper v. Poston*, 1 Duv. 92; and see *Brannin v. Force*, 12 B. M. 506, and see notes 1-5 to sec. 126.

§ 330. (1) **Verdict and judgment in action for recovery of property.** In an action for the recovery of specific personal property, the jury should fix in their verdict the value of the property and the damages for its detention; and the judgment should be in the alternative for the return of the property or its value in case a return can not be had, and damages for the taking and withholding of the property. *Rogers v. Bradford*, 8 Bush 163; *Young v. Parsons*, 2 Met. 490; *Bates v. Buchanan*, 2 Bush 117; *Strubbee v. C. R. W. Co.*, 78 Ky. 481; and see notes to sec. 181.

(2) To authorize a jury to assess damages for property illegally taken and detained, there should be some evidence of the value, or some description of the property, to enable the jury to determine the value from their own knowledge. *Pharis v. Carver*, 13 B. M. 237.

ARTICLE 3.

TRIAL BY THE COURT.

§ 331. Actions in tort—effect of trial by court.

§ 332. Law and facts to be separately stated.

§ 331 ⁽³³¹⁾ **Actions in tort—effect of trial by court.** 1. In an action for an injury to the person or character of the plaintiff, the parties may, with the consent of the court, waive a jury trial, by written consent, in person or by attorney, filed with the clerk; or, by oral consent in court, entered on the record.

2. If a jury trial be not demanded, or be waived, the court shall decide the issues, and make such assessments of value, damage or amount of recovery as it would have been the duty of a jury to make; and the finding of the court shall have the same effect as that of the jury would have had. (*Form of capias ad satisfaciendum, page 639.*)

§ 332 ⁽³³²⁾ **Law and facts to be separately stated.** Upon trials of questions of fact by the court, it shall not be necessary for the court to state its

§ 331. (1) **Court, trial by—motion for new trial.** In a common law action, where the law and facts are submitted to the court, a motion and grounds for a new trial are necessary in order to bring before the Appellate Court any errors committed by the court during the progress of the trial. *Helm v. Coffey*, 80 Ky. 176; *Henderson v. Dupree*, 82 Ky. 678; *Harper v. Harper*, 10 Bush 447; see further, 95 Ky. 60.

(2) **Judgment—how regarded.** When the law and facts are submitted to the court, every fact which goes to support the judgment must be assumed to have been found in favor of the party for whom judgment was given, and every fact as to which the evidence is conflicting must be assumed to have been found against the adverse party. *Coleman v. Meade*, 13 Bush 358; and see note 1, sec. 10.

(3) The submission of the law and facts to the court clothes the court with all the rights and functions of a jury in determining the facts, and in the assessment of damages; and the judgment will not be disturbed upon the ground that it is against the evidence for any less reason than would authorize the setting aside of the verdict of a jury. *Baum v. Winston*, 3 Met. 127; *Mulholland v. Samuels*, 8 Bush 63.

(4) See notes 1–5, inclusive, to sec. 126 as to assessment of value and damages by the court.

(5) **Waiver of jury trial.** Waiver of a trial by jury should appear in the entry submitting the facts to the court; or it may be inferred from an entry showing that the court heard testimony and pronounced judgment thereon; but such inference can not be indulged in where nothing appears but a judgment by default. *Clarke v. Seaton*, 18 B. M. 226. It was held that where a party appeared and filed an insufficient answer, the failure to plead further was not a waiver of his right to a trial by jury. *Burgess v. Jacobs*, 14 B. M. 517. But the transfer of a case by consent to the equity docket is a waiver of a trial by jury. *Smith v. Moberly*, 15 B. M. 70.

(6) **Weight given to judgment.** Where the law and facts are submitted to the court, its findings of facts are to be treated as the verdict of a properly instructed jury, and will not be disturbed unless palpably against the evidence. *Bell v. Wood*, 87 Ky. 56; and see note 1 to sec. 10.

§ 332. (1) **Stating separately law and facts—practice.** The section of the Code requiring the court to state separately the law and facts does not relate to the

finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found, separately from the conclusions of law. (*Form of judgment, page 647.*)

ARTICLE 4.

EXCEPTIONS.

§ 333. Exception—how taken—objection when necessary.

§ 334. Exception when to be taken—time to prepare bill.

§ 335. Bill of exceptions—how prepared.

§ 336. Entry of exception on record—when sufficient.

§ 337. Bill of exceptions—time to prepare—bystander's bill.

§ 338. Error not substantial disregarded.

§ 339. Certificate of judge to bill.

§ 333 [333] Exception—how taken—objection when necessary. 1. An exception is an objection taken to a decision of the court upon a matter of law.

trial of provisional remedies. *Francis v. Burnett*, 84 Ky. 24; *Haynes v. Wiley*, 12 R. 299. See further, 95 Ky. 60.

(2) When the court upon request states separately its conclusions of law and fact, there must be an exception to the conclusions of law; a motion for a new trial, in the absence of such exception, will not cure omission. *American Aid Society v. Bronger*, 91 Ky. 406.

(3) When neither the law nor the facts, nor both combined, authorize the judgment, no separation is necessary. *Com. v. King*, 86 Ky. 436; nor is it necessary to separate conclusions of law and fact in an equity case. *Hartford Ins. Co. v. Haas*, 87 Ky. 531; nor when an agreed state of facts is submitted to the court. *City of Owensboro v. Weir*, 95 Ky. 158.

§ 333. (1) **Amendment.** An exception taken to the filing of an amendment that is allowed to be filed without objection is not available; objection should have been made to the filing. *Helburn v. Mofford*, 7 Bush 169.

(2) **Demurrer.** An error in overruling a demurrer must be excepted to at the time. *Beaven v. Phillips*, 83 Ky. 88.

(3) **Depositions.** When an exception goes to the whole of a deposition, and some of it is competent, it should be overruled. *L. & N. R. R. Co. v. Graves*, 78 Ky. 74; see further, sec. 586.

(4) When depositions are excepted to, it must appear that the exception was acted on, or it will not avail. *Corn v. Sims*, 3 Met. 391; *Lewis v. Wright*, 3 Bush 311; *Walrath v. Viley*, 1 Bush 266.

(5) **Evidence.** A party must object to the introduction of incompetent evidence, and, if it is allowed over his objection, must except to it at the time, or the error is waived. *Crabb v. Larkin*, 9 Bush 154; *Helburn v. Mofford*, 7 Bush 169; *Russell v. Marks*, 3 Met. 37; *L. & N. R. R. Co. v. Graves*, 78 Ky. 74; where an objection was entered to the admission of evidence, and at the close of the evidence the bill of exceptions stated "to all of which the defendant excepted," held sufficient exception. *L. & N. R. R. v. Ritter*, 85 Ky. 368.

(6) A decision of the court in excluding testimony must be excepted to at the time, or the error is waived. *Terrill v. Jennings*, 1 Met. 450.

2. A party may, without a previous objection, except to a decision against him, unless it be made at the instance of the adverse party.

3. But a party can not except to a decision made at the instance of the adverse party, unless objection shall have been made to the motion, offer or request of the adverse party. (*Exceptions to depositions, how taken, secs. 586, 587.*)

§ 334 ⁽³⁰⁴⁾ **Exception when to be taken—time to prepare bill.** The party objecting must except when the decision is made; and time may be given to procure a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court. (*Form of bill, page 645.*)

(7) **Final orders need not be excepted to.** Final judgments, whether upon issues of law or fact, need not be excepted to. Where a demurrer to an answer is sustained and judgment rendered against the defendant, or where a peremptory instruction is given, no exception is necessary. *Coffman v. Wilson*, 2 Met. 542; *Craycraft v. Duncan*, 6 R. 651; *Loving v. Warren Co.*, 14 Bush 316. Nor is it necessary to except to a void order. *Smith v. Blakeman*, 8 Bush 476.

(8) **Instructions — exceptions to.** Although instructions may be objected to, if no exception is taken to the action of the court in giving them, their correctness can not be questioned. *L. & N. R. R. Co. v. Graves*, 78 Ky. 74; *Cox v. Winston*, 3 Met. 577; *Reed v. Com.*, 7 Bush 641; *Garrot v. Ratliff*, 83 Ky. 384.

(9) The exception to an instruction must be taken at the time it is given, and the circuit court can not adopt any rule of practice in contravention of the provisions of the Code requiring exceptions and objections to be taken and made as therein directed. *Kennedy v. Cunningham*, 2 Met. 538; *Letton v. Young*, 2 Met. 558.

(10) An objection must be made to the giving of an instruction on the motion of the adverse party, as well as an exception taken if it is given, or the error will not be considered. *Loving v. Warren Co.*, 14 Bush 316; *Long v. Hughes*, 1 Duv. 387; *Forest v. Crenshaw*, 81 Ky. 51.

(11) **Objection and exception.** Unless an objection is first made, an exception to a decision made at the instance of the ad-

verse party is unavailing. *Loving v. Warren Co.*, 14 Bush 316.

(12) **Peremptory instruction**—neither an objection or exception is necessary to enable a party to complain of. *Loving v. Warren Co.*, 14 Bush 316; 2 Met. 542.

(13) **Rule of court** that exception need not be taken at time is not valid. *Kennedy v. Cunningham*, 2 Met. 538.

(14) **Waiver of error.** Neither party can rely for reversal upon an erroneous decision made at the instance of the adverse party unless he objected to the motion or offer of the adverse party at the time it was made, and then excepted to the decision; but where the court acts upon its own motion an exception alone is sufficient. *Branson v. Com.*, 92 Ky. 330.

§ 334. (1) **Bill can not be filed in vacation.** A bill of exceptions can not be filed in vacation in the clerk's office, nor at any time except during term time. Nor can this rule be changed by an order of court; and it is questionable if by agreement of parties, entered of record, a bill filed in vacation can be considered. *Allard v. Smith*, 2 Met. 297; *Freeman v. Brenham*, 17 B. M. 603; and see *Van-dever v. Griffith*, 2 Met. 425; *Corley v. Evans*, 4 Bush 400.

(2) **Death of one of the parties before bill filed.** The death of the appellee before the time allowed for filing the bill of exceptions will not prejudice the appellant if his bill be tendered within the time allowed; although there may have been no revivor. *Hayden v. Ortkelass*, 83 Ky. 396.

[If the judge of said court, for any cause, does not preside at the said term of the court, or no court is held, then the party offering the bill of exceptions shall have until the next term of the court to perfect and prepare the bill of exceptions.] (*Words in brackets added by act 1886. Form of bill, pages 645, 646.*)

(3) **Jefferson Court of Common Pleas.**

The Jefferson Court of Common Pleas has the same power over its judgments for sixty days that the circuit courts have during the term. If under any circumstances the court is authorized to extend the time to file a bill to a day beyond a period of sixty days from the judgment, it can not be filed after the day so fixed if no notice is taken of the matter on that day. *Bailey v. Villier*, 6 Bush 27. If time be extended by that court beyond sixty days from date of judgment, and the bill is filed within the time allowed without objection, the error, if any, will be regarded as waived. *Downing v. Bacon*, 7 Bush 680; see further, *Johnson v. Stivers*, 95 Ky. 128; holding that not more than one hundred and twenty days can be allowed after judgment to file bill.

(4) **Nunc pro tunc** order that "the parties came by their attorneys, and it appearing at the trial of this cause at the last term of this court the court allowed defendants time to prepare a bill of exceptions," and thereupon "the bill was filed as part of the record," was invalid, as no time had been given at a former term to file the bill. *Vandever v. Griffith*, 2 Met. 425.

(5) **Pendency of motion for new trial—effect of.** The time for filing a bill of exceptions is reckoned from the overruling of the motion for a new trial, and not from the rendition of the judgment on the verdict, and the court has no power pending the motion for a new trial to prescribe the time within which the bill of exceptions shall be filed; and where a judgment was rendered at the March term, 1873, and the motion for a new trial not finally disposed of until the March term, 1874, a bill of exceptions filed during latter term was in time. *Harper v. Harper*, 10 Bush 447.

(6) **Record must show time was given.** If

time is given in which to prepare and file a bill of exceptions, the record must show that the time was given, or it can not be filed, although by neglect or oversight the order giving time was not made. *Vandever v. Griffith*, 2 Met. 425; *Linch v. Reynolds*, 6 Bush 547.

(7) **Special judge.** When a special judge, who has tried a case, extends time for filing bill to a day in next term, and is not present on that day, the party who then tenders bill is entitled to have offer to file continued to succeeding term, and then have bill signed by special judge. *McFarland v. Burton*, 89 Ky. 204.

(8) **Stenographer's report of testimony.** It was held in *McAlister v. Conn. Life Ins. Co.*, 78 Ky. 531, that the stenographer's report of evidence, unless identified in the bill of exceptions, would not be regarded as part of the record, but see now, as to stenographers in certain counties, Ky. Stat., sec. 4637.

(9) **Tender of bill to judge** is equivalent to filing, and it may be tendered to him before day fixed for filing, and be filed by him subsequent to that day. *Meaux v. Meaux*, 81 Ky. 475.

(10) **Time to file bill of exceptions.** The defendant was given until the third day of the succeeding term to prepare and file a bill of exceptions. On that day no notice was taken of the matter, and on the fourth day an order was made extending the time in which to file bill to the eighth day. On motion the bill was stricken from the record. The bill should have been filed on or before the third day, or further time to a day certain given on that day. *L. & N. R. R. Co. v. Turner*, 81 Ky. 489. See *Freeman v. Brenham*, 17 B. M. 603.

(11) Time was given until a day in the next term to file bill of exceptions, and on the day specified an order was made giving further time. Two days afterward the bill was filed. The bill was not con-

§ 335 [335] **Bill of exceptions—how prepared.** 1. No particular form of exception, or bill of exceptions, is required. A party must not, except as hereinafter provided, state the evidence, but must state the material facts which the evidence conduced to prove; and, if the exception be to a decision admitting or excluding testimony, or concerning its meaning or effect, so much of the evidence as is necessary to explain the exception, and no more, shall be stated.

sidered as part of the record. When time is given until a day in the next term to file a bill, an order may be made on the day specified extending the time to *another day certain* in the term; and for sufficient reasons, further extensions may be given from one day certain to another day certain during the term. *Smith v. Blakeman*, 8 Bush 476. See *Meadows v. Campbell*, 1 Bush 104.

(12) When time is given to a day in the next term to file bill of exceptions, it may be filed during that term and before the day specified. When a bill is tendered in court and taken for consideration by the judge, it is to be regarded as filed on the day it is tendered. *Meaux v. Meaux*, 81 Ky. 475; *White v. Allen*, 10 R. 1025; and the orders should state the facts. *Nance v. Newport News R. R.*, 13 R. 554.

(13) A bill of exceptions, showing by a memorandum of the clerk, but not an order of court, that it was filed in time, will not be considered. *Padget v. Mays*, 2 R. 213.

(14) Giving time to file bill of exceptions does not operate to stay proceedings on the judgment. *Wright v. Woolfolk*, 14 Bush 308.

(15) It was held in *Wright v. Woolfolk*, 14 Bush 308, that extending time to file bill of exceptions did not extend time to file assignment of errors and schedule or prevent their being filed within time required by Code.

(16) Delay without excuse, from week to week, for six months in preparing bill of exceptions, is sufficient reason for refusing to consider it over objection of adverse party. *Schneider v. Hesse*, 11 R. 433.

(17) Time must be given to prepare the bill at time exception is taken. 2 Met. 425; and when time is given it

must be to a certain day. *Smith v. Blakeman*, 8 Bush 476; 95 Ky. 128.

§ 335. (1) **Absence of bill of exceptions**—only sufficiency of pleadings to support the verdict can be considered, and every presumption will be indulged that the pleadings authorize. *Martin v. Richardson*, 14 R. 847.

(2) **Bill of exceptions—when not necessary.** Where a verdict for the plaintiff is set aside and a judgment entered for defendant on the ground that the petition does not state a cause of action, a bill of evidence is not necessary to enable the Court of Appeals to consider the sufficiency of the petition, and reverse the case if a reversal is proper. *Johnson v. Louisville R. W. Co.*, 10 Bush 231.

(3) **Bill of exceptions—requisites of.** A positive or direct statement in the bill that it contains all the evidence, or all the instructions given or refused, is not essential to make the bill complete. When an appeal is prosecuted upon an issue of fact and the law applicable thereto, and reversal is asked because the verdict is not sustained by the evidence, the bill should contain all the evidence in detail, and each and every instruction given or refused to which an exception was taken. If the objection to the judgment is not want of evidence to support the verdict, but because of the admission or rejection of testimony, the material facts must be stated that the evidence conduced to establish. The presumption will be in favor of the truth of the bill, and the affidavits of counsel will not be considered to destroy the verity of the record as certified to by the judge. *Garrot v. Ratliff*, 83 Ky. 384; *Bracken Co. v. Robertson Co.*, 6 Bush 69; *Wing v. Dugan*, 8 Bush 583; and see further, note 18, and sec. 339 and notes thereto.

2. If the judge refuse to sign the bill of exceptions, as presented; or if the party wish to appeal upon the ground that the verdict is not sustained by the evidence, it shall be stated in full, and the bill of exceptions be presented to the judge. (*See sec. 339.*)

3. But if a number of instruments of substantially the same character be used upon a trial it shall be sufficient to furnish a copy of one of them in the bill of exceptions, accompanied by a statement showing its resemblance to the others, and how many such others were used on the trial; and such copy and statement shall have the same effect as if all of said instruments had been copied in the bill of exceptions. (*When writings filed as exhibits are part of record, sec. 128; form of bill, pages 645, 646.*)

(4) The bill of exceptions does not state the facts which the testimony conduced to prove, when it only states that "the evidence in the case was conflicting and conduced to show the facts respectively claimed by the parties in the pleadings." The bill should state the material facts which the evidence conduced to prove. *Beavens v. Phillips*, 83 Ky. 88.

(5) **Depositions** used as evidence upon trial can not be considered upon appeal unless embraced in bill, or identified by order of court. *L. & N. R. R. v. Finley*, 86 Ky. 294; nor will depositions copied into the record, but not embodied in bill of exceptions or read on trial, be considered. *Harlan v. Howard*, 79 Ky. 373.

(6) When depositions offered as evidence are rejected, the record should show that an exception was taken to the ruling rejecting them, and the grounds of objection, as well as the rejected depositions, should be incorporated into the bill of exceptions. *Walrath v. Viley*, 1 Bush 266; sec. 589.

(7) When two depositions are given by a witness and one only is read, if both are copied in the record, it should show which one was read. *Crabb v. Larkin*, 9 Bush 154.

(8) When depositions have been regularly taken and are lodged with record and read on trial, they should be copied as part of record although never indorsed as filed. *Long v. Kerrigan*, 15 R. 65.

(9) **Evidence rejected—how made part of record.** When objection is made and

sustained to a witness answering a question, the party offering the witness should state to the court what he expected the witness would state if permitted to answer the question, and the record should show it, or else the alleged error in refusing the evidence can not be considered. *Manion v. Lambert*, 10 Bush 295; *Bowler v. Lane*, 3 Met. 312; *Dickerson v. Talbot*, 14 B. M. 60; *L. C. & L. R. R. Co. v. Sullivan*, 81 Ky. 624.

(10) When a party objects to the introduction of evidence, the record should show his objections, and so much of the evidence as is necessary to explain the grounds of it. *Easley v. Easley*, 18 B. M. 86; and see, as to statements in bill as to evidence, note 3.

(11) A bill of exceptions which shows that it contains all the evidence is sufficient, although it does not state in so many words that it contains all the evidence. *Bracken Co. v. Robertson Co.*, 6 Bush 69.

(12) In absence of any part of evidence court will not consider any question relating to the testimony offered or introduced on trial. *L. & N. R. R. v. Finley*, 86 Ky. 294.

(13) **Facts appearing upon face of papers**, no bill of exceptions is necessary. *Collins v. Richart*, 14 Bush 621: 78 Ky. 531.

(14) **Grounds for new trial.** It is not necessary that the motion and grounds for a new trial should be copied into the bill of exceptions. When the motion and grounds for a new trial are filed by order of court, and the order filing the

§ 336 [306] **Entry of exception on record—when sufficient.** If the decision objected to be entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts.

grounds, and the motion and grounds, are copied into the transcript, there is no necessity for including them in the bill of exceptions. *McAllister v. Ins. Co.*, 78 Ky. 531.

(15) **Instructions.** Express statement in bill that it contains all the instructions is not required. If it shows that certain instructions were asked by plaintiff and defendant, and either given or refused, in the absence of anything showing that others were given or refused, bill will be sufficient in this respect. *L. & N. R. R. v. Finley*, 86 Ky. 294.

(16) An alleged error in giving or refusing instructions can not be considered in the absence of the testimony. *Beaven v. Phillips*, 83 Ky. 88.

(17) A bill of exceptions is not necessary to enable the Court of Appeals to determine whether or not the general and special verdicts are consistent or inconsistent; the pleadings, judgment and instructions are all that is necessary. *Quaid v. Cornwall*, 13 Bush 601.

(18) "The usual mode of making up bills of exceptions is by the direction, here insert instructions 1, 2, or instructions A, B, H, or instructions in the handwriting of the court or counsel, so as the clerk can identify them, and when copied into the bill of evidence in the usual form, the bill is complete and the instructions a part of record; or when the court directs the insertion of the instructions without identifying them and the clerk inserts the instructions, thereby making the bill complete, this court will not grant the writ of *subpoena duces tecum* that the original bill may be inspected, unless there is an affidavit that the instructions embodied in the bill were not those offered, given or refused by the court on the trial, and so with reference to any *exhibit* made part of the bill of evidence." *Meaux v. Meaux*, 81 Ky. 475; and see *Forest v. Crenshaw*, 81 Ky. 51; and see further, note 3.

(19) When instructions found in the record are not embraced in the bill of exceptions, they will not be considered (*Meador v. Turpin*, 4 Met. 94) unless made a part of the record by an order of court. *Forest v. Crenshaw*, 81 Ky. 51.

(20) **Pleadings rejected—how made part of record.** When the record shows that an amended pleading was not allowed to be filed, unless it is made a part of the record by an order of court, or by the bill of exceptions, it can not be considered, although copied into the record. *Horstman v. C. & L. R. R. Co.*, 18 B. M. 218; 7 Bush 474; *Johnson v. Miller*, 12 R. 82; *Sutton v. Pollard*, 13 R. 85; *McCain v. L. & N. R. R.*, 13 R. 809.

(21) When amended pleadings offered to be filed are rejected, the order should show that they are made a part of the record, and they should be identified either by the order of court rejecting them or by the certificate of the clerk as the papers tendered and rejected. *Nolan v. Feltman*, 12 Bush 119.

(22) **Presumption.** The Court of Appeals will presume, in the absence of a bill of exceptions, that the lower court properly overruled a motion for a new trial. *Quaid v. Cornwall*, 13 Bush 601.

(23) **Stenographer's report** of the evidence, although annexed to the bill of exceptions, is not a part of it unless identified in the bill and as part of it. *McAllister v. Ins. Co.*, 78 Ky. 531; but see now Ky. Stat., sec. 4637.

(24) **Writings—how made part of record.** Deeds, wills and other writings introduced as evidence should be made part of bill by entry on order book. *Baker v. Gilbert*, 4 R. 621; or be copied into the bill of exceptions, and it should show that they were read as evidence. *Vaughn v. Mills*, 18 B. M. 633; *Haney v. Tempest*, 3 Met. 95; *Duncan v. Brown*, 15 B. M. 186; see sec. 128 and note thereto, as to when writings filed to be relied on as evidence become part of the record.

§ 337 [1877] **Bill of exceptions—time to prepare—bystander's bill.** 1. If the decision be not entered on the record, or the grounds of objection do not appear in the entry, the party must prepare his bill of exceptions and present it to the judge for his signature.

2. Exceptions taken during the trial need not be noted of record, nor reduced to writing, unless by order of court, until after the trial. [During the term at which the judgment becomes final] the party excepting shall, unless further time be given him, prepare his bill of exceptions, which shall include all the decisions of the court excepted to, in consecutive order; and, if he except to a decision of the court in granting or refusing any instruction, all the instructions given and refused shall be also included. (*Words in brackets inserted by act 1878. Form of bill, pages 645, 646.*)

3. If the bill of exceptions be approved by the judge, he shall sign it, and it shall be filed as part of the record, but not spread at large on the order book. If not approved, he shall correct it, or

§ 337. (1) **Bystander's bill.** The truth of what the judge states or certifies as the bill of evidence may be controverted by the affidavits of bystanders in the form of a bill of evidence, but when he certifies as to his own ruling and exceptions taken during the trial, neither his statements, nor the truth of the record as made up, can be assailed by bystanders. *Garrot v. Ratliff*, 83 Ky. 384; *Patterson v. Com.*, 86 Ky. 313.

(2) Where the judge who presides at trial presides when motion for new trial is disposed of, a bystander's bill can not be prepared as provided in subsection 5. *Deils v. Brown*, 2 R. 214.

(3) Bill of exceptions signed by bystanders will not be considered where it is apparent that if bill had been prepared in time judge would have signed it. In this case preparation of bill was delayed from time to time for six months. *Schneider v. Hesse*, 11 R. 433.

(4) Where the trial judge refuses to sign any bill of exceptions the appellant may make up a bill and have it certified by bystanders. *Com. v. Hourigan*, 89 Ky. 305.

(5) Jurors trying a case are "bystanders." An exception, the truth of which is attested by bystanders, need not contain anything except the particular mat-

ter about which there is difference. *Dawson v. L. & N. R. R.*, 6 R. 659.

(6) **Judge must sign bill of exceptions** or it will not be considered on appeal. *Stanford v. Parker*, 12 R. 878.

(7) **Time to prepare bill of exceptions.** The provision in this subsection that "at the close of the trial the party excepting shall, unless further time be given him, prepare his bill of exceptions," means that the party excepting shall reduce his exceptions to writing, or ask for the necessary extension of time during the day on which the trial terminates or the judgment becomes final. If a motion for a new trial is made, the judgment becomes final on day it is overruled. *Scott v. Burrows*, 13 Bush 450; *Yeatman v. Day*, 79 Ky. 186; but see now amendment to subsec. 2.

(8) If further time be given to file a bill of exceptions, and the absence of the judge who presided at the trial prevents it being signed by him within the allotted time, then it should be certified by bystanders. *Hayden v. Ortkeiss*, 83 Ky. 396.

(9) The death of the appellee before the time allowed in which to file bill of exceptions does not prejudice the adverse party; he should tender his bill within the time allowed. 83 Ky. 396.

suggest the correction to be made, and sign it. A party objecting to the judge's correction of an exception which purports to state the evidence may, within five days after the bill is signed, file the exception, as written by him, if its truth be attested by the affidavits of two bystanders; but its truth may be controverted and maintained by other affidavits filed in the clerk's office, not exceeding five on either side.

4. Affidavits controverting an exception not signed by the judge must be filed in the clerk's office, and notice of the filing given, within fifteen days after the filing of such exceptions; and affidavits sustaining such exception must be filed within fifteen days after such notice.

5. If the judge who presided at the trial do not preside when a motion for a new trial is overruled, the bill of exceptions may be certified by bystanders, and be controverted and maintained, pursuant to the provisions of subsections three and four of this section.

§ 338 (***). **Errors not substantial disregarded.** No exception shall be regarded, unless the decision to which it relates be prejudicial to the substantial rights of the party excepting. (*Same provision in secs. 134, 756.*)

§ 339. **Certificate of judge to bill.** In cases in which, by subsection two of section three hundred and thirty-five, the evidence is required to be stated in full, the judge shall certify in the bill of exceptions that it contains all the evidence. In all other cases, he shall certify that the bill of exceptions is true.

(10) Where the judge who tries case extends time to day in next term to prepare bill of exceptions and is not present on that day, party may on that day tender his bill in court and have time continued to succeeding term for judge to sign bill. *McFarlan v. Burton*, 89 Ky. 204.

§ 339. (1) **Signing bill by judge — effect of.** The signing of the bill by the judge is in substance certifying that it contains all the evidence; or that the bill of exceptions is true, when all the evidence is not embraced in it; and affidavits of counsel will not be considered for the purpose of impeaching the verity of the record, as certified by the judge. "The truth of what the judge certifies as the bill of evidence may be controverted by the affidavits of bystanders in the form of a bill of evidence; but

when the judge certifies as to his own rulings, and exceptions taken during the progress of the trial, we know of no practice that authorizes his statements, or the verity of the record as made up, to be assailed either by bystanders or the affidavits of parties interested in the litigation." *Garrott v. Ratliff*, 83 Ky. 384, *Patterson v. Com.*, 80 Ky. 313, and notes to sec. 335.

(2) As to a statement appended by judge to bill of exceptions after he had signed and approved it the court say that "if the bill correctly set forth the evidence, it was the duty of the judge to sign it; if it did not conform to the evidence it was his duty to correct it and then sign it," and after he has signed the bill his statement subsequently written and appended is unauthorized and will not be considered. *Com. v. Patterson*, 10 R. 167.

ARTICLE 5.

NEW TRIAL.

§ 340. New trial defined—causes for.

§ 341. When not to be granted.

§ 342. Application for—when to be made.

§ 343. Motion and written grounds—affidavits.

§ 344. Grounds discovered after term—practice—divorce cases.

§ 340 (300) **New trial defined—causes for.** A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court. The former verdict or decision may be vacated and a new trial be granted, on the application of the party aggrieved, for any of the following causes affecting materially his substantial rights:

§ 340. (1) **Accident—surprise.** Known defenses must be pleaded, and the court will not grant a new trial to allow parties to avail themselves of a defense known to them when judgment was rendered. *Dickinson v. Trout*, 8 Bush 441. See further sec. 518 and notes thereto.

(2) Although one of the appellant's counsel was prevented by sickness from attending the trial, there was a lack of diligence on the part of appellant in not attending the trial, or providing other counsel, and it does not appear that he was prevented from defending the action by any unavoidable casualty or misfortune. *Landrum v. Farmer*, 7 Bush 46. As to unavoidable absence of attorney, see further, *Triplett v. Scott*, 5 Bush 81; of party see *Yowell v. Gaines*, 2 Bush 211.

(3) After judgment by default has been rendered, if the defendant desires a new trial on account of accident or surprise, he should tender an answer presenting a good defense. *Hayman v. Haliam*, 79 Ky. 389.

(4) When a party seeks to have a judgment set aside he should show that he has not been guilty of any lack of diligence. *Alexander v. Lewis*, 1 Met. 407.

(5) The fact that a witness testifies contrary to what he did on a former trial is not ground for a new trial. *Ivers v. Avery*, 6 R. 220.

(6) When a party institutes an ordi-

(13)

nary action it is his duty to exercise ordinary diligence to inform himself when it is set for trial and to be in attendance, and neither accident nor surprise is cause for setting aside judgment in the absence of such diligence. *Ross v. L. & N. R. R.*, 92 Ky. 583; and see *Chaffin v. Fulkerson*, 95 Ky. 277.

(7) A party who has prepared his case for trial, but is prevented from attending by the sudden and serious illness of his child, is entitled to a new trial. *Steel v. Seale*, 4 R. 42.

(8) An attorney prepared an answer and, being compelled to leave the court, left the answer with his associate counsel to file, and he being unwell did not attend court; judgment being rendered by default a new trial was proper. *Reinicke v. Morse*, 10 R. 767.

(9) Plaintiff and his attorney being both absent from the court room when judgment was rendered by default, it was proper to grant a new trial, as it appeared that the attorney was unexpectedly absent and the plaintiff a short distance off waiting to be notified by his attorney when case was called. *C. & O. R. R. v. Hickey*, 15 R. 112.

(10) To entitle party to new trial on ground of accident or surprise, it should appear that the party has been injured in his rights, as well as that his failure to appear was caused by accident or misfortune. *Robinson v. Amann*, 1 R. 326.

1. Irregularity in the proceedings of the court, jury or prevailing party, or any order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

(11) **Discretion of court in granting a new trial** will be interfered with only in exceptional cases. *C. & O. R. R. v. Hickey*, 15 R. 112; *Ivers v. Avery*, 6 R. 220; and only when there is a flagrant abuse of discretion in granting a new trial will the court reverse second judgment and direct that first judgment be entered. *L. & N. R. R. v. Coniff*, 16 R. 296; *Couadeau v. Am. Accident Co.*, 95 Ky. 280; *Caldwell v. Bright*, 8 B. M. 525; 3 J. J. M. 320.

(12) **Errors must be specified.** The grounds relied on for a new trial must be specifically set out. The general ground, "because of errors of law occurring at the trial and excepted to by the party making the application," or "that verdict is contrary to law," provided in subsections 6, 8, not sufficient. The specific error to which an exception was taken during the trial must be mentioned. *McLain v. Dibble*, 13 Bush 297; *Slater v. Sherman*, 5 Bush 206; *Com. v. Williams*, 14 Bush 207; 7 Bush 235; *Ohio Valley Co. v. Kuhn*, 9 R. 407; *Jones v. Wocher*, 90 Ky. 230.

(13) "All that is necessary in any case is to use such plain and intelligible language in the grounds for new trial as indicates, points out or shows to the court, with reasonable and ordinary certainty, the particular errors which are complained of, so as to enable the court, by the exercise of proper attention, to understand what errors are meant, and to reconsider the facts or law out of which they are alleged to have grown. The law does not mean that the grounds for new trial shall contain a particular description of the errors relied on, but that the particular errors shall be simply pointed out or indicated in a common-sense way." *L. & N. R. R. Co. v. McCoy*, 81 Ky. 403; *Meaux v. Meaux*, 81 Ky. 475.

(14) While the general statement that verdict is against law and evidence is not sufficient, yet when the lower court has granted a new trial upon such a statement the court will not reverse the second judgment and direct first to be entered

for the reason that the grounds upon which new trial was granted were insufficient. *L. & N. R. R. Co. v. Coniff*, 16 R. 296.

(15) **Excessive damages — remitter of judgment.** It has been repeatedly held by the court that a new trial would not be granted because of excessive damages, unless the damages should be so great as to strike the mind at first blush as having been superinduced by passion or prejudice. *L. & N. R. R. v. Mitchell*, 87 Ky. 327; *Standard Oil Co. v. Tierney*, 92 Ky. 367; *Letton v. Young*, 2 Met. 558, and see *Kountz v. Brown*, 16 B. M. 577; *M. & L. R. R. Co. v. Herrick*, 13 Bush 122; *Shirley v. Billings*, 8 Bush 147; *L. & N. R. R. Co. v. Fox*, 11 Bush 495; *L. & N. R. R. Co. v. Long*, 94 Ky. 410; 2 Met. 119; 83 Ky. 129; 83 Ky. 675; in 94 Ky., page 411, and 92 Ky., pages 369, 370, will be found cited numerous cases on question of excessive damages.

(16) When a verdict is flagrantly against the evidence, the court can not refuse a new trial, because party remits part of judgment; but if error in amount recovered is caused by an erroneous instruction, so much of the judgment as was due to such instruction, if it can be ascertained, may be remitted and remainder allowed to stand. *Merrick v. Holt*, 7 R. 758.

(17) When a party undertakes to prevent a new trial by remitting a portion of the judgment obtained by erroneous instructions, he is bound to remit so much as will show the court that the defendant can not be prejudiced by refusing the new trial asked for, and that the amount retained is clearly sustained by the proof. *Masterson v. Hagan*, 17 B. M. 325.

(18) In an action for malicious prosecution the plaintiff recovered a verdict for \$4,000, the defendant filed grounds and moved for a new trial, the judge announced that he would grant a new trial unless the plaintiff would accept \$1,000; the plaintiff agreed to this, and

2. Misconduct of the jury, of the prevailing party, or of his attorney.

3. Accident or surprise which ordinary prudence could not have guarded against.

the motion for a new trial was overruled. The court say: "Courts have often granted new trials on equitable conditions prescribed to the applicant, but we know no precedent for overruling a motion for a new trial on terms required of the party opposing it. In this instance the court virtually assessed the damages, and thereby deprived each party of his right to an assessment by the jury. This seems to be error to the prejudice of the defendant, if he was entitled to a new trial, and to the plaintiff's prejudice if the defendant was not entitled to a new trial." *Brown v. Morris*, 3 Bush 81; *L. & N. R. R. v. Earl*, 94 Ky. 368; *Merrick v. Holt*, 7 R. 758.

(19) **Grounds should be filed by order of court.** Motion and grounds for a new trial should be filed by order of court, entered on the order book and should also be indorsed filed. When this is done the motion and grounds become a part of the record when copied into the transcript, and it is not necessary to include them in the bill of exceptions. *McAllister v. Ins. Co.*, 78 Ky. 531.

(20) **Irregularity of judge, jury or party.** After the jury had retired for consultation, one of the witnesses, who had been examined on the trial, was sent for by them, admitted into the jury room and re-examined without the knowledge of the court or parties. Held that although he was the witness of the party seeking the reversal, the misconduct of the jury authorized a new trial. *Luttrell v. M. & L. R. R. Co.*, 18 B. M. 291; and see 3 Mon. 411.

(21) That juror was on jury that had tried the case at a former term is not cause for a new trial. The objection to him should have been made before the jury was sworn, or before the jury had retired, if not discovered before that time. *Fitzpatrick v. Harris*, 16 B. M. 561.

(22) **Affidavits of jurors can not be**

received to impeach their verdict for misbehavior in themselves or their fellow jurors. *Allard v. Smith*, 2 Met. 297; as to when jurors will be allowed to explain their verdict or correct mistake in it, see *Alexander v. Humber*, 86 Ky. 565; *Johnson v. Davenport*, 3 J. J. M. 396.

(23) An affidavit of a juror is not competent evidence to show that the verdict was the result of an agreement that such a verdict should be rendered as was favored by a majority of the jury. *Lucas v. Cannon*, 13 Bush 650; 3 Mon. 411; and see *Cain v. Cain*, 1 B. M. 214, as to when partiality of juror is grounds for new trial.

(24) It is a well-settled principle, applicable to the conduct of all juries, that the testimony of the jurors is not competent to explain the grounds of their decision, or to impeach the validity of their findings. *Com. v. Skeggs*, 3 Bush 19; *Johnson v. Davenport*, 3 J. J. M. 396.

(25) When the court rules that defendant has burden of proof and requires him to introduce his evidence first, and afterward gives the plaintiff conclusion of argument, defendant is entitled to a new trial. *O'Connor v. Henderson Bridge Co.*, 95 Ky. 693.

(26) Denial of concluding argument to party who has burden of proof is reversible error. *Royal Ins. Co. v. Schwing*, 87 Ky. 410; *Lucas v. Hunt*, 91 Ky. 279.

(27) Where the defendant, in passing near one of the jury during the trial, said in his hearing, "Don't hang," it was an insult to the juror, a contempt of court and cause for a new trial. *Campbell v. Bannister*, 79 Ky. 205.

(28) As to correspondence between the judge and jury, after they had retired for consultation concerning a point at issue in the case, see *Goode v. Campbell*, 14 Bush 75; as to improper statement by judge to jury to induce them to make a verdict, see *Randolph v. Lampkin*, 90 Ky. 551.

4. Excessive damages, appearing to have been given under the influence of passion or prejudice.

5. Error in the assessment of the amount of recovery, whether too large or too small, in an action upon a contract, or for the injury or detention of property.

(29) **Instructions.** "Grounds which merely state that the court erred in giving or refusing instructions is sufficient to raise any and all questions upon this point, but where the party expressly indicates the giving or refusal of certain instructions as error and names none others, either expressly or in a general way, he will be confined to them." *Johns v. L. & N. R. R.*, 10 R. 757; *Bland v. Gaither*, 10 R. 1033.

(30) Where one ground for new trial was that court erred in giving certain designated instructions, and another ground was that court erred in giving an instruction as to compensatory damages, this latter instruction can be considered on appeal, although it was omitted in first ground. *L. & N. R. R. v. Morris*, 14 R. 466.

(31) **Motion for—not necessary to maintain appeal.** Neither a motion for a new trial nor bill of exceptions is necessary to enable the unsuccessful party to maintain an appeal. The only office of a motion for a new trial and a bill of exceptions is to bring before the court for revision matters which would not otherwise appear. When an appeal is prosecuted from a judgment on a verdict, or the judgment of the court when the law and facts are submitted to it, without a motion for a new trial and a bill of exceptions, nothing is before the court except the pleadings, verdict and judgment. *Harper v. Harper*, 10 Bush 447; *McAllister v. Ins. Co.*, 78 Ky. 531; 80 Ky. 176; 82 Ky. 678; *Owensboro R. R. v. Barker*, 15 R. 175; nor is motion for necessary when a peremptory instruction has been given. *Loving v. Warren Co.*, 14 Bush 316; 2 Met. 542; nor when pleadings are not sufficient to support verdict. 15 R. 175.

(32) But "on an issue and trial of a fact by a jury, a motion for a new trial is essential to correct the errors growing

out of the evidence or instructions." *Detherage v. Montgomery*, 4 Bush 46; *Humphrey v. Walton*, 2 Bush 580.

(33) **Motion for—suspends judgment.** A motion for a new trial suspends the judgment, and may be continued and passed on at the subsequent term. But a motion to set aside an order overruling a motion for a new trial does not suspend the judgment. There is no authority for a motion to rehear a motion for a new trial. *Louisville R. & L. Co. v. Kerr*, 78 Ky. 12; and see *Harper v. Harper*, 10 Bush 447.

(34) **Newly discovered evidence.** "The general rules governing applications for new trials upon the ground of newly discovered evidence are: 1. That 'the names of the witnesses who have been discovered' must appear. 2. That the party has been vigilant in preparing his case for trial. 3. That the new facts were discovered after the trial and would be important. 4. That the evidence discovered will tend to prove facts which were not directly in issue on the trial or were not then known, nor investigated by the proof. 5. That the new evidence is not merely cumulative." *Price v. Thompson*, 84 Ky. 219.

(35) The affidavit of the plaintiff's attorney, that he did not know of the existence of a city ordinance material as evidence in the case until after the trial, is not sufficient to authorize a new trial. *Babbitt v. Woolley*, 3 Bush 703; and see *McCown v. Maklin*, 7 Bush 308; *Rhodes v. City of Henderson*, 2 R. 228.

(36) The fact that a party does not know of the evidence by which he can establish his defense does not excuse him from presenting the defense. A defense of which the defendant must have had knowledge, if it was true, not relied on, or presented on the trial, can not be made available on a motion for a new trial. *Mason v. Mason*, 5 Bush 187.

6. That the verdict or decision is not sustained by sufficient evidence, or is contrary to law.

7. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

(37) Where a party discovers testimony, even after the argument has commenced, and it can then be given, it is his duty to ask that it be heard, and if he fail to offer it, it is no ground for a new trial; nor can a party get a new trial on the ground that he has discovered testimony that would strengthen his case. *Fleet v. Hollenkemp*, 13 B. M. 220.

(38) Cumulative evidence is not sufficient to authorize a new trial. *Mason v. Mason*, 5 Bush 187; *Allen v. Perry*, 6 Bush 85; *Bell v. Offut*, 10 Bush 632.

(39) When the ground for a new trial is newly discovered evidence, affidavits must be filed to sustain it. *Slone v. Slone*, 2 Met. 339; sec. 343.

(40) In an action to enforce a vendor's lien the defendant alleged want of title and asked a rescission and the rescission was granted; soon afterward the plaintiff discovered a deed that perfected his title, and filed a petition for a new trial, alleging that the index to the deed book in which the deed was found had been lost or destroyed, and after a diligent search he did not discover the deed until after the judgment; held that he was not bound to do more than to search for the deed in the usual way by the aid of the indexes, and a new trial should have been granted. *Elliott v. Harris*, 81 Ky. 470.

(41) To entitle a party to a new trial on the grounds of newly discovered evidence, it must not only have been discovered too late to have been used upon the trial, but must have been of such a nature or so concealed that it could not have been previously discovered by the use of reasonable diligence. The discovery of a deed on record in the proper office will not entitle a party to a new trial. *Denny v. Wickliffe*, 1 Met. 216.

(42) The statement in the affidavit of the witness filed in support of the motion for a new trial that he had not communicated the facts to the party until

after the trial, is not sufficient; the party himself should state that the facts were unknown to him until after the trial. *Bronson v. Green*, 2 Duv. 234.

(43) Where a party loses a case because of insufficient evidence, he is entitled to a new trial if prevailing party confess that verdict is against justice and truth and is willing to so testify. *Pigg v. Whitman*, 2 R. 320.

(44) To entitle a party to a new trial, when the point upon which it is sought was in issue in the former trial, the discovered evidence must be of such a permanent and unerring character as to preponderate greatly, or have a decisive influence upon the evidence to be overturned by it. *Allen v. Perry*, 6 Bush 85; *Mitchell v. Berry*, 1 Met. 602; *Mercer v. Mercer*, 87 Ky. 21; *Porter v. First Nat. Bank*, 2 R. 212.

(45) "It is a general rule that a new trial should not be granted upon the sole ground of a discovery after verdict of *parol* testimony concerning a point litigated, or a fact known to a party, because the converse of this rule would open a wide field for unfairness and subornation, and would tend to protract litigation and render it not only uncertain, but almost interminable." *Leonhart v. Stalzenberger*, 7 Bush 209; 87 Ky. 21.

(46) **New trial on payment of costs.** The Ky. Stat., sec. 899, provides that a new trial may be granted upon condition that the costs of former trial are paid by the party applying therefor within forty days. But the court is vested with a sound legal discretion in each case, and may refuse to set aside the order granting a new trial, although the costs are not paid within forty days. The time should not be less than forty days. *Myers v. Lummis*, 80 Ky. 456; and see *Mattingly v. L. & N. R. R.*, 92 Ky. 463; *Galbraith v. Galbraith*, 5 R. 859.

(47) The court can not order *all costs* to

8. Error of law occurring at the trial and excepted to by the party making the application.

§ 341 [270] **When not to be granted.** A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action in which the dam-

be paid, but only costs of former trial, but when court granted new trial upon payment of all costs, the party should have offered to pay costs of former trial. *Carbon v. Stout*, 7 Bush 609; and when a new trial is granted because of error of the court in instructing the jury over the objection of a party, he should not, when granted a new trial, be required to pay any costs. *Ullman v. Abraham*, 9 Bush 738.

(48) **Peremptory instruction.** Motion for new trial not necessary. *Loving v. Warren Co.*, 14 Bush 316; *Coffman v. Wilson*, 2 Met. 542; *Owensboro R. R. v. Barker*, 15 R. 175.

(49) **Practice.** On the calling of a case defendant moved for a continuance on account of absence of his counsel; his motion was overruled and a judgment rendered against him, with time to prepare bill of exceptions. He filed a petition for a new trial on ground of "casualty and misfortune," in that his attorney was absent, and the court held upon appeal from judgment, dismissing petition, that proper remedy was by appeal from first judgment and not by petition for new trial. *Beckham v. Morrison*, 14 R. 241; when a party is taken by surprise during the trial of a case, the correct practice is to move for a continuance or postponement, and not to take the chances of a verdict, or failing in that to apply for a new trial. *Shipp v. Suggett*, 9 B. M. 5.

(50) The Court of Appeals may, when a new trial has been granted and there is an appeal from the second judgment, direct the entry of first judgment if it has been erroneously set aside. *Couadeau v. American Accident Co.*, 95 Ky. 280; and see note 11.

(51) After getting a new trial, the party obtaining can not appeal from the original judgment. *McCall v. Hitchcock*, 9 Bush 60.

(52) **Trial by court—motion for new trial.**

In a common law action, where the law and facts are submitted to the court, a motion and grounds for a new trial made within three days are necessary in order to a review by the Appellate Court of any alleged errors committed during the trial. In the absence of a motion and grounds for a new trial, nothing is before the court except the inquiry as to whether the pleadings state any cause of action or defense, and whether the evidence authorizes the judgment. *Helm v. Coffey*, 80 Ky. 176; *Henderson v. Dupree*, 82 Ky. 678; *Harper v. Harper*, 10 Bush 447; and this rule applies, although the conclusions of law and fact are separately stated. 82 Ky. 678.

(53) **Verdict not sustained by law or evidence.** In an action to recover damages for the loss of a slave, where the verdict was for \$1,500, the court say: "The question of damages was peculiarly within the province of the jury, and although we might not concur with the jury as to the correctness of their estimate, we do not feel authorized to disturb the verdict for that reason." *McClain v. Esham*, 17 B. M. 146; *L. & N. R. R. Co. v. Graves*, 78 Ky. 74; *Bell v. Keach*, 80 Ky. 42.

(54) Verdict will not be disturbed because not sustained by the evidence unless it is clearly and palpably against the weight of it. *Thompson v. Thompson*. 93 Ky. 435; *Urso v. Unverzagt*, 2 R. 228.

(55) If the plaintiff fails to set out a good cause of action, and the defect is not cured by answer (*Fible v. Caplinger*, 13 B. M. 464); or if the plaintiff shows no right to sue, a verdict for the plaintiff should be set aside. *Petty v. Malier*, 14 B. M. 246; and see sec. 386 and notes thereto as to when judgment may be rendered against verdict.

§ 341. (1) **Smallness of damages—when cause for new trial.** When in an action for

ages equal the actual pecuniary injury sustained; nor shall more than two new trials be granted to a party upon the ground that the verdict is not sustained by the evidence.

§ 342 [372] **Application for—when to be made.** The application for a new trial must be made at the term in which the verdict or decision is rendered; and, except for the cause mentioned in section three hundred and forty, subsection seven, shall be within three days after the verdict or decision is rendered, unless unavoidably prevented.

§ 343 [373] **Motion and written grounds—affidavits.** The application must be by motion upon written grounds filed at the time of making the motion. The grounds mentioned in section three hundred and forty, subsections two, three and seven, must be sustained by affidavits showing their truth; and may be controverted by affidavits.

any injury to the person special damages are alleged and proved, and the jury disregard the evidence and the law and find for the plaintiff only one cent, a new trial should be awarded. This section does not apply to the actual pecuniary damages resulting directly from the wrong. These damages can be measured, and the rule that a new trial shall not be granted on account of the smallness of the damages does not apply. *Ray v. Jeffries*, 86 Ky. 367; *Taylor v. Houser*, 12 Bush 465; *Jesse v. Shuck*, 11 R. 463.

(2) Plaintiff is not entitled to a new trial on account of smallness of damages where they cover actual pecuniary loss sustained. *Callahan v. Harris*, 6 R. 657.

(3) **Three verdicts for same party.** Where there have been three verdicts for the same party, the court will not disturb the third verdict, although the judgments in the first two cases were reversed for errors of law, and the third verdict is against the weight of evidence. *L. & N. R. R. Co. v. Graves*, 78 Ky. 74; *L. & N. R. R. v. Adams*, 10 R. 713; *L. & N. R. R. v. Ballard*, 88 Ky. 159.

§ 342. (1) **Motion to be made within three days—additional grounds.** A motion for a new trial must be made within three days after the verdict is returned, whether the verdict be general or special. *Imperial Ins. Co. v. Kiernan*, 83 Ky. 468; and although a motion for judgment, notwithstanding verdict may be pending. *Ruhrwein v. Gebhart*, 90 Ky. 147.

(2) The requirement that the motion shall be made within three days means three juridical days, and the day on which the verdict or decision is rendered, and the day on which the motion is made, are both computed. *Long v. Hughes*, 1 Duv. 387; *White v. Crutcher*, 1 Bush 472; *Humphrey v. Walton*, 2 Bush 580.

(3) When motion is not made in three days nothing but pleadings and finding of jury can be considered on appeal. *Western Assurance Co. v. Rector*, 85 Ky. 294; 90 Ky. 147.

(4) When grounds for a new trial have been filed within three days after the verdict, the court may permit additional grounds to be filed after the expiration of three days and before motion is disposed of. *Houston v. Kidwell*, 83 Ky. 301; but additional grounds can not be filed after motion has been made and overruled. *Ky. C. R. R. v. Smith*, 93 Ky. 449.

(5) **Sunday intervening** between day verdict is rendered and motion made will not be counted in estimating the three days. *Frazier v. Clark*, 88 Ky. 260.

(6) **Trial by court.** If the law and facts are submitted to the court, a motion and grounds for a new trial must be filed within three days from the day the decision is rendered. *Helm v. Coffey*, 80 Ky. 176; *Henderson v. Dupree*, 82 Ky. 678.

§ 344 [373] **Grounds discovered after term—practice—divorce cases.** If grounds for a new trial be discovered after the term at which the verdict or decision is rendered, the application may be made by a petition filed with the clerk not later than the second term after the discovery—on which a summons shall issue, as on other petitions, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the court. The evidence may be either by depositions or by witnesses examined in court. But no such application shall be made more than three years after the final judgment was rendered; nor do the provisions of this section apply to divorce cases, so far as the judgment for divorce is concerned. (*Further provisions concerning, secs. 518 to 524.*)

ARTICLE 6.

GENERAL PROVISIONS.

§ 345. Amount of damages recoverable.

§ 346. Provisions of title apply to trials by court.

§ 345 [374] **Amount of damages recoverable.** If damages be recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.

§ 344. (1) **Divorce.** Court of Appeals has no revisory power over judgment granting even from bed and board. *Evans v. Evans*, 93 Ky. 500; *Irvin v. Irvin*, 16 R. —

(2) **Judgment—how vacated after term.** After the term, a final order or judgment can not be vacated, except in the mode prescribed by sections 344, 519, 520, and for the causes mentioned in sections 340 and 518. *Hocker v. Gentry*, 3 Met. 463; *McManama v. Garnett*, 3 Met. 517.

(3) **Limitation.** New trial can not be granted under this section after expiration of three years from rendition of judgment. *Anderson v. Meredith*, 10 R. 460; nor after expiration of second term after discovery of grounds; *Nickell v. Fallen*, 15 R. 389.

(4) **New trial after term—practice.** Where an issue was formed by pleadings in the

suit in which the new trial is sought it is not necessary to allege and prove a valid defense to the action before a new trial can be granted. It is sufficient to show that an issue had been joined or that party had been prevented from forming an issue or presenting his defense, and that the grounds for new trial are embraced by subsections 2, 3 or 7 of sec. 340. *Steel v. Seale*, 4 R. 42.

(5) **Petition—when to be filed.** The petition is not required to be filed in open court during the term, but, like other petitions, it must be filed with the clerk, and the length of time before the second term after the discovery necessary to allow summons issued and returned for trial at that term. *Scott v. Scott*, 82 Ky. 328.

§ 345. **Vindictive damages.** The right of a plaintiff to recover vindictive damages for personal injuries, where the

§ 346 [375] **Provisions of title apply to trials by court.** The provisions of this title, respecting trials by jury, apply, so far as they are in their nature applicable, to trials by the court.

ARTICLE 7.

TIME OF TRIAL.

- § 347. Three dockets to be kept.
- § 348. Common docket—entries on.
- § 349. Common docket—arrangement of.
- § 350. Jury trial—time of.
- § 351. Equity docket—entries on.
- § 352. Motion docket—entries on.
- § 353. Dockets to show names of parties and attorneys.
- § 354. Common docket—what it shall show.
- § 355. Motion docket—what it shall show.
- § 356. First hour each day for motions.
- § 357. Equity docket may be called.
- § 358. Proceedings after motion hour.
- § 359. Ordinary cases called after motion hour.
- § 360. Equity docket called on third day.
- § 361. Issues of law in equity cases tried third day—judgment.
- § 362. Motion made by entering it on docket.
- § 363. Ordinary actions—when stand for trial.
- § 364. Equity actions—when stand for trial.
- § 365. Party interrogated—when entitled to trial.
- § 366. Plaintiff in equitable action may demand trial—when.
- § 367. Trial as to part of defendants.

§ 347 [375] **Three dockets to be kept.** The clerk shall keep three separate dockets, which shall be called the common docket, the equity docket and the motion docket.

§ 348 [377] **Common docket—entries on.** On the common docket shall be entered all the ordinary actions in the order in which they are brought. (*Action may be transferred to equity, secs. 8 to 15.*)

§ 349 [378] **Common docket—arrangement of.** The common docket shall be made out for each term of the court; and the actions shall be set for particular days, and so arranged by the clerk that the cases set for each day shall be tried, as nearly as may be, on that day.

commission of the act complained of is accompanied with circumstances of aggravation, has been repeatedly recognized, and must now be regarded as a

settled rule of law. Punitive, vindictive and exemplary damages are in legal contemplation synonymous. *Chiles v. Drake*, 2 Met. 146; and see note 16, sec. 340.

§ 350 [3579] **Jury trial—time of.** The trial of any issue of fact or assessment of damages by a jury in any case shall be on or after the day set on the docket for its trial.

§ 351 [3580] **Equity docket—entries on.** On the equity docket shall be entered all equitable actions in the order in which they are brought. (*Action may transferred to ordinary, secs. 8 to 13.*)

§ 352 [3581] **Motion docket—entries on.** On the motion docket may be entered any motion relating to proceedings in the court. (*Motion defined, sec. 623.*)

§ 353 [3582] **Dockets to show names of parties and attorneys.** The entry on all the dockets shall give the names of the plaintiff and defendant; or, if there be more than one, those of the first named in the pleadings, with the words “and others” added thereto, and the names of the attorneys. (*Officer’s return on summons to be entered, sec. 570.*)

§ 354 [3583] **Common docket—what it shall show.** The entry on the common docket shall also show whether or not the summons has been fully served in due time for trial, and whether or not the issues have been formed.

§ 355 [3584] **Motion docket—what it shall show.** The entry on the motion docket shall show the date of the entry and the object of the motion.

§ 356 [3585] **First hour each day for motions.** The first hour of each day of the term shall be devoted to hearing motions—in which the court shall first call the motion docket; and then, upon the attorneys present, for motions.

§ 357 [3586] **Equity docket may be called.** If the hour be not consumed in motions, the court may proceed, during the remainder thereof, to call the equity docket.

§ 358 [3587] **Proceedings after motion hour.** At the expiration of the motion hour, the court, except on the third day of the term, shall proceed to the call of the common docket and the trial of the issues until the call be completed; and then to the call of the equity docket.

§ 359 [3588] **Ordinary actions called after motion hour.** On each day of the term the court shall, immediately after the hearing of motions, call

§ 352. **Motion.** In proceeding by motion, plaintiff may, on day specified in notice, make motion in court and have it entered of record or cause it to be placed on the motion docket, and in either case the motion will be regarded as regularly pending in court. *Bent v. Maupin*, 86 Ky. 271.

§ 359. **Trial of cases.** There is no provision of the Code or rule of practice

which authorizes the court, before an action is ready for trial, to hear and try it, and render a judgment in favor of one of the parties (whose right to recover anything on the final hearing is not admitted), on the mere probability that he will be then entitled to the sum adjudged in his favor. The court has no right to take a case up and hear it, except as provided for in the Code, in

all the cases on the common docket set for that day in which the summons has been served in due time, as provided in section one hundred and two, and in which no issue of fact has been formed; and, upon failure to defend, may render judgment; and at the same time may hear and determine all issues of law in such actions, and render judgment, or give further time for hearing and deciding them.

§ 360 [339] **Equity docket called on third day.** On the third day of each term the court shall call all cases on the equity docket in which the summons has been served, as provided in section one hundred and two, and upon failure to defend may give judgment.

§ 361 [340] **Issues of law in equity cases tried third day.** On the third day the court may hear and decide all issues of law in the actions, as they are called; and render judgment, or give further time for hearing or deciding them.

§ 362 [341] **Motion made by entering it on docket.** The entry of a motion on the motion docket shall be considered as making the motion.

§ 363 [342] **Ordinary actions—when stand for trial.** Ordinary actions shall stand for trial at the first term after process has been served on the defendant, as specified in section one hundred and two. An action upon contract, wherein the summons has been served in due time, as provided in section one hundred and two, upon part only of the defendants, shall stand for trial at the first term as to those so summoned, and may be continued as to the others for further proceedings. In other ordinary actions, the plaintiff can only demand a trial at any term as to part of the defendants upon his discontinuing his action on the first day of such term as to the others. (*See further, secs. 370, 373.*)

opposition to the wishes of either party. *Mattingly v. Bosley*, 2 Met. 443.

§ 362. (1) **Change of venue—time of trial.** When a case is removed by change of venue from one county to another, if the case would stand for trial at the succeeding court of the county from which it is removed, and the papers be filed in the clerk's office of the court to which it is removed ten days before the ensuing term, it will stand for trial at that term. *Dale v. Hays*, 14 B. M. 315.

(2) **Plea of payment by one of several obligors—no judgment should be rendered against any of them until the issue is disposed of.** *Rouse v. Howard*, 1 Duv. 31; *Williams v. Rogers*, 14 Bush 776.

(3) **Tort—trial as to some of defendants—**

judgment. In an ordinary action not founded on a contract, the plaintiff can only demand a trial as to part of the defendants, when he has dismissed his action against those not summoned on the first day of the term, and judgment rendered against any of the defendants, unless this requirement is complied with, is erroneous. *Hedger v. Downs*, 2 Met. 160; *Buckles v. Lambert*, 4 Met. 330.

(4) If several persons jointly commit a tort, the plaintiff in general has his election to sue all or some of the parties, and if several are jointly sued, and a joint verdict is rendered against them, the court may set aside the verdict as to one or more and let it stand as to the others. *Buckles v. Lambert*, 4 Met. 330;

§ 364 ⁽³⁹²⁾ **Equity actions—when stand for trial.** Equitable actions shall stand for trial at any term, if the pleadings have been, or, by the provisions of sections one hundred and two, one hundred and four, one hundred and five, and one hundred and six, should have been completed [sixty] days before the commencement of such term. But, if they have not been so completed, though they should have been, by those sections, the party in default as to time shall not be entitled to demand a trial. (*Word in brackets inserted by act 1892; see further, secs. 366, 367.*)

§ 365 ⁽³⁹⁴⁾ **Party interrogated when entitled to trial.** If interrogatories be annexed to a pleading in an equitable action, the party interrogated shall not be entitled to demand a trial, unless he have answered the interrogatories either within twenty days after they were filed or twenty days before the term.

§ 366 ⁽³⁹⁶⁾ **Plaintiff in equitable action may demand trial—when.** The plaintiff shall be entitled to a trial in an equitable action, at the first term after the summons has been served on all the defendants as provided in section one hundred and two, if no issue of fact be made by the pleadings; or, if the plaintiff consent that the statements of the answer may be taken as true.

§ 367 ⁽³⁹⁸⁾ **Equitable action—trial as to part of defendants.** If the summons in an equitable action have been served in due time on part only of the defendants, the plaintiff may dismiss his action as to those not summoned, and proceed to trial as to the others, if he could have maintained his action against them without joining those not summoned.

Shelton v. Harlow, 15 B. M. 547; and see U. S. of Shakers v. Underwood, 11 Bush 265; Sellards v. Zomes, 5 Bush 90, and notes to sec. 373.

(5) Joint trespassers—joint or several judgment against is proper. Alexander v. Humber, 86 Ky. 565; 86 Ky. 578.

§ 364. (1) **Non-resident—equitable action against.** An equitable action against a non-resident does not stand for trial until ninety-[now sixty] days after the pleadings ought to have been completed. Harris v. Adams, 2 Duv. 141.

(2) In equitable actions in the Louisville Chancery Court, "when the order of warning is entered the defense must be filed in sixty days thereafter." Irish B. and L. Association v. Clemons, 78 Ky. 79.

(3) **Time of trial—pleadings to be completed.** An action does not stand for trial

at the term at which a reply to a counterclaim is filed, the reply being necessary to complete the pleadings. Smith v. Ferguson, 3 Met. 424.

§ 366. (1) **Trial of equitable action at term answer is filed,** on motion of defendant, is not error, when the plaintiff gets judgment for all he is entitled to under his petition. Lowe v. Lowe, 13 Bush 688.

(2) When there is no objection to the hearing nor motion for a continuance, nor for a rehearing, it can not be adjudged that the hearing was premature or erroneous, although the case was submitted a few days after the filing of an amended answer. Moses v. Rowland, 3 Bush 505.

(3) An equitable action does not stand for trial at the term at which an answer

CHAPTER III.

JUDGMENT.

ARTICLE 1. JUDGMENT IN GENERAL, 368.

2. UPON FAILURE TO PLEAD, 379.
3. JUDGMENT BY CONFESSION, 381.
4. MANNER OF GIVING AND ENTERING, 384.
5. CONVEYANCE BY COMMISSIONERS UNDER, 394.

ARTICLE 1.

JUDGMENT IN GENERAL.

- § 368. Judgment defined.
- § 369. Judgment for or against one or more of parties.
- § 370. Judgment as to some, continuance as to others.
- § 371. Dismissal of action without prejudice.
- § 372. Trial of set-off or counter-claim.
- § 373. Judgment may be against part of defendants.
- § 374. Enforcement of lien not to be postponed.
- § 375. Foreclosure of mortgage forbidden.
- § 376. Enforcement of lien and personal judgment.
- § 377. Set-off of judgments for money.
- § 378. Enjoining collection of judgment.

§ 368 (397) **Judgment defined.** A judgment is a final determination of a right of a party in an action or proceeding. (*Forms of judgments, page 647; what are final orders, see secs. 266, 267, 298.*)

making an issue is filed, unless the plaintiff consents that the statements may be taken as true. *Gruel v. Smalley*, 1 Duv. 358.

§ 368. (1) **Enforcement of judgment** by rule requiring party to bring money to satisfy judgment into court is not allowable. *Cofer v. Woodyard*, 5 R. 858; and see *Ky. Stat.*, secs. 1650, 1663, providing that execution may issue on judgment at law or in equity.

(2) **Erroneous judgment** can not be assailed in a collateral proceeding. *Green v. Ball*, 4 Bush 586; *Newcomb v. Newcomb*, 13 Bush 544; and see as to void judgment, note 17.

(3) **Final order defined.** Final judgments "are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for." A final order "either terminates the ac-

tion itself, decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original position." *Helm v. Short*, 7 Bush 623. See *M. & L. R. R. Co. v. Punnett*, 15 B. M. 47; *Turner v. Browder*, 18 B. M. 825; and a decree is a judgment. *Hughes v. Shreve*, 3 Met. 547; and see further as to final orders notes to sec. 734.

(4) **Interest may be computed** on principal sum to date of judgment, and judgment be rendered for amount with interest. *Turpin v. Turpin*, 4 R. 438; *Ky. Stat.*, sec. 2220.

(5) **Judgment—what should it state.** "A judgment should show who has succeeded, what has been recovered and from whom, or, in brief, what has been determined by the court." *Parsons v.*

§ 369 [300] **Judgment for or against one or more of parties.** Judgment may be given for or against one or more of several parties. (*If on contract it will not bar proceedings against others, sec. 27.*)

Spencer, 83 Ky. 305; but judgment in favor of the "descendants" of a person without naming them is not void for uncertainty. *Stevenson v. Flournoy*, 89 Ky. 581; and see sec. 390; and notes 6, 7 to sec. 370.

(6) **Judgment against cestui que trust** in an action to which trustee is not a party does not bind him, and he may resist its enforcement against the estate. *Roberts v. Yancy*, 94 Ky. 243.

(7) **Judgment against administrator** not binding upon heirs in action to subject property descended to them. *Willis v. Roberts*, 90 Ky. 122; *Jones v. Com. Bank*, 78 Ky. 413.

(8) **Judgments bind no persons** except the parties to the action or their privies. *Meadows v. Goff*, 90 Ky. 540; nor do they bind parties not before the court. *Simms v. Simms*, 88 Ky. 642.

(9) **Judgment final** which completely settles the rights of the parties, although there is an order retaining case on docket for purpose of executing judgment. *Brown v. Vancleave*, 86 Ky. 381; and see further as to final judgment, notes to sec. 734.

(10) **Nunc pro tunc judgment.** Although neither the minutes nor order book showed that judgment had been rendered at a previous term, the filing by defendants of supersedeas bond and assignment of errors were sufficient admissions of record to authorize the court to enter a *nunc pro tunc* judgment. *Wade v. Bryant*, 9 R. 875.

(11) "During the term the court has power to alter or amend the record according to the truth of the case, but after the term expires the court ceases to have such power, except in cases of clerical misprision, and even then it is an inviolable rule that no amendment can be made unless there is something in the record to amend by. The mere recollection of the judge as to what took place at a former term is not sufficient to authorize an addition to or amendment of the record in regard to any order or

judgment. *Boyd Co. v. Ross*, 95 Ky. 167; and see *Raymond v. Smith*, 1 Met. 65, and sec. 390 and notes thereto.

(12) **Parol evidence** is admissible, to show what was determined in the former action, if it does not appear from the record. *Maize v. Bowman*, 93 Ky. 205.

(13) **Personal judgment** should not be rendered when none is asked. *Cavanaugh v. Fried*, 3 R. 253; *Howland v. Brown*, 13 Bush 681; and see further as to judgment that may be rendered under prayer of petition, notes 47-51 to sec. 90.

(14) **Res judicata.** The burden is upon party relying upon the bar to show that the merits of the case were considered. *Pepper v. Donnelly*, 87 Ky. 259.

(15) The rule is well settled that to constitute the former judgment a bar to another suit founded on the same cause of action it must appear to have been a decision upon the merits. But if the trial went off on a technical defect, or because the debt was not due, or because the court had not jurisdiction, or because of the temporary disability of the plaintiff to sue, or the like, the judgment will be no bar to a future action. *Birch v. Funk*, 2 Met. 544.

(16) "Ordered that this cause be dismissed at defendant's costs, and leave given to withdraw note sued on by leaving a copy in the papers," is not a final order, and can not be pleaded in bar of a subsequent action on the same note. *Hibler v. Shipp*, 78 Ky. 64; and see notes to sec. 371.

(17) When demurrer to petition is overruled and case heard upon law and facts and petition dismissed, it will be presumed in the absence of rebutting circumstances that the trial was upon the merits, but the presumption is not conclusive. 87 Ky. 259; see further, notes to sec. 371.

(18) Judgment dismissing petition is a bar to another action for the same relief, provided the determination has reached the merits of the case, and whether the facts upon which court acts are shown by evidence or averred in petition and ad.

§ 370 [299] **Judgment as to some, continuance as to others.** In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, if a several judgment be proper. (*When several judgments not proper, sec. 80, and see secs. 363, 373.*)

mitted by demurrer. *Maize v. Bowman*, 93 Ky. 205.

(19) When a judgment which has been affirmed upon appeal is relied upon in bar of another action the ground of affirmance must be taken to be the same upon which judgment was rendered, and resort had to opinion to determine whether there was a decision upon the merits. 87 Ky. 259.

(20) The judgment of a court having jurisdiction of the subject matter and the parties is conclusive, not only as to all matters determined by it, but as to all incidental matters which might have been properly litigated and decided in the same suit, until it has been reversed or vacated in some of the modes known to the law. *Honaker v. Cecil*, 84 Ky. 202; *Crabb v. Larkin*, 9 Bush 154; *Francis v. Wood*, 81 Ky. 16; *Sears v. Sears*, 95 Ky. 173; *Harpending v. Wylie*, 13 Bush 158; *Clark v. Rodes*, 12 Bush 13; 81 Ky. 16; 14 Bush 746.

(21) See further, notes to sec. 390.

(22) **Statement in that summons has been executed.** It clearly is no part of the judgment of the court to state whether the summons has been executed or not, and the statement in the judgment that summons has been executed is not proof of that fact. *Robinson v. Mobley*, 1 Bush 196; *Long v. Montgomery*, 6 Bush 394.

(23) **Void judgment** may be resisted in any court in which it is attempted to be enforced, and in order to obtain relief from it, neither an appeal nor a direct proceeding to vacate judgment is necessary. *Spencer v. Parsons*, 89 Ky. 577; *Stevens v. Deering*, 10 R. 393; but when the court has jurisdiction, and the defendant appears, or is warned according to law, the judgment is not void, although it may be erroneous in all its parts, nor can it be assailed collaterally. *Derr v. Wilson*, 84 Ky. 14; *Newcomb v. Newcomb*, 13 Bush 544.

§ 370. (1) **Continuing action as to part.** In an action in tort against several defendants, some of whom have and some of whom have not been summoned, it is error to render judgment against any of them unless the action is discontinued as to those not summoned on the first day of the term. *Hedger v. Downs*, 2 Met. 160; *Buckles v. Lambert*, 4 Met. 330; see sec. 363 and notes.

(2) Where several are sued and judgment is rendered against some of them, it is not necessary to make an order continuing the case as to the others; the action as to them stands continued by operation of law. *Patton v. Shanklin*, 14 B. M. 15.

(3) In an action on a return of "no property" against the execution defendant and others who are made defendants and who, it is alleged, are each separately indebted to the execution defendant in certain specified amounts, judgment may be rendered against some of them and the action continued as to the others. *Joyce v. O'Toole*, 6 Bush 31.

(4) **Judgment against trespassers.** "A judgment against one co-trespasser or wrong-doer will not *per se* bar a subsequent action against a different defendant for the same, or a different asportation or conversion of the same property." *U. S. Shakers v. Underwood*, 11 Bush 265; see further as to judgments in actions *ex delicto*, notes 3-5 to sec. 363.

(5) Joint or several judgment may be rendered in action against trespassers. *Alexander v. Humber*, 86 Ky. 565; *Central Pass. Co. v. Kuhn*, 86 Ky. 578.

(6) **Judgment — how construed.** Where several are sued and some are served with process, judgment against "the defendants" without naming them will be understood as a judgment against the defendants only who are summoned. *Waller v. Martin*, 17 B. M. 181; *Clark v. Finnell*, 16 B. M. 320.

§ 371 ^[400] **Dismissal of action without prejudice.** An action, or any cause of action, may be dismissed without prejudice to a future action—

1. By the plaintiff, before the final submission of the case to the jury, or to the court, if the trial be by the court.

2. By the court—

a. If the plaintiff fail to appear at the trial.

b. For the want of necessary parties.

c. On the application of a defendant, if there be others whom the plaintiff fails to prosecute with diligence.

d. For disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases, upon the trial of the

(7) In an action against several, one of them being a nominal and unnecessary party between whom and the plaintiffs there was no litigation, a judgment against "the defendants," without discrimination, although erroneous, is a clerical misprision. *C. H. & D. R. R. Co. v. Spratt*, 2 Duv. 4; see further, notes to secs. 27, 373.

(8) **Replevying judgment by part of defendants.** Where several persons are sued and judgment is rendered against some of them and replevied, it does not bar proceedings against the others. *Burrus v. Anderson*, 3 Met. 500; *Nat. Bank v. Bryant*, 13 Bush 419.

§ 371. (1) **Counter-claim or set-off** not affected by dismissal of action; but after plaintiff has made motion to dismiss it is too late to file counter-claim. Sec. 372; *Northwestern Ins. Co. v. Barbour*, 95 Ky. 7; and see notes, page 81.

(2) **Defect of parties.** When there is a defect of parties the action should be dismissed without prejudice, unless within a reasonable time the defect is cured. *Turpin v. Thompson*, 2 Met. 420; *Carpenter v. Miles*, 17 B. M. 598; and see note 3 to sec. 92.

(3) **Dismissed agreed—effect of.** When an action is dismissed agreed, it will be a bar to a recovery on the same cause of action between the same parties. *Hibler v. Shipp*, 78 Ky. 64.

(4) **Dismissal without prejudice—effect of.** A dismissal without prejudice leaves the parties as if no action had been instituted, and when on issue formed and proof heard the court "dismisses the

action without prejudice," it will be presumed that the case was not disposed of on its merits. *Magill v. Mercantile Co.*, 81 Ky. 129.

(5) **Dismissal—when not a bar.** Dismissal of a cross-bill as to one of the causes of action set up, with an express reservation as to all other matters, is no bar to another action for the matters reserved. *Harrow v. Johnson*, 3 Met. 578; and see notes 14-19 to sec. 368.

(6) If a trial went off on a technical defect, or because the debt was not due, or because the court had no jurisdiction, or because of the temporary disability of the plaintiff to sue, or the like, the judgment will not be a bar to a future action. *Birch v. Funk*, 2 Met. 544; *Pepper v. Donnelly*, 87 Ky. 259; *Yankey v. Sweeney*, 85 Ky. 55; see notes 14-19, sec. 368.

(7) Dismissal of a petition absolutely, when it should have been dismissed without prejudice, will not bar another action on the same cause when the plaintiff in the action dismissed had no right of action; the legal effect is the same as if the petition had been dismissed without prejudice. *Bracken Co. v. Robertson Co.*, 6 Bush 69.

(8) Where this order was made, "ordered that this cause be dismissed at defendant's cost, and leave is given the plaintiff to withdraw the note sued on by leaving a copy in the papers," it did not bar another action on the note. *Hibler v. Shipp*, 78 Ky. 64.

(9) **Filing away case** for want of prosecution is not a final order or bar to a

action, the decision must be upon the merits. (*Upon failure of plaintiff to secure costs, sec. 617; see further as to dismissal, sec. 85.*)

§ 372 [401] **Trial of set-off or counter-claim.** A defendant is entitled to a trial of a set-off or counter-claim, although the plaintiff dismiss his action or fail to appear. (*As to judgment on, sec. 387.*)

subsequent action on the same cause. *Nickel v. Fallen*, 15 R. 389; 7 R. 758.

(10) The practice of filing away cases is not authorized by the Code, but if a case has been filed away with leave to reinstate, the plaintiff is entitled upon notice and motion to that effect to have case redocketed. *Whailey v. Myers*, 7 R. 758.

(11) **Final submission to jury** is not made "until all questions of law have been disposed of by the court, instructions and papers pertaining to the case actually delivered to the jury and they are authorized without further interposition or control of the court to proceed to a judicial examination of the issue submitted to them." *Vertree v. N. N. & M. V. R. R.*, 95 Ky. 314.

(12) **Party can not dismiss his action** to the prejudice of others who have the right to avail themselves of his pleading, as in an action under act of 1856. *Heldrich v. Silva*, 89 Ky. 422; *Sawyers v. Sanford*, 5 Bush 539; *Baker v. Kinnaird*, 94 Ky. 5; *Roberts v. Phillips*, 11 Bush 11; nor can court file action away so to defeat rights of other creditors, 5 Bush 539; nor can a party, after commencement of trial, withdraw a defense that another party has right to avail himself of. *Hearn v. Lander*, 11 Bush 669.

(13) In an action for the recovery of specific personal property, where the plaintiff has executed bond and obtained possession of the property, he can not, over the objection of the defendant, dismiss his action and retain the property. *Rogers v. Bradford*, 8 Bush 163.

(14) **Practice.** An action was dismissed without prejudice, and the court, on motion of plaintiff, set aside order conditioned upon payment of all costs by him within sixty days, failing to pay costs order dismissing remained in force and is not bar to another action. *Mattingly v. L. & N. R. R. Co.*, 92 Ky. 463.

(15) An action should not be dismissed,

(14)

with or without prejudice, because the plaintiff neglects or fails to have a guardian *ad litem* appointed for the infant defendants. It is the duty of the court to see that a guardian *ad litem* is appointed, and where the case is submitted before the appointment of the guardian the submission should be set aside and a guardian appointed. *C. & L. R. R. Co. v. Bowler*, 9 Bush 468.

(16) In an action against an administrator and others on a bond, if the affidavit and demand required by law have not been made, the action should be dismissed without prejudice as to the administrator, but not as to the others. *Rogers v. Mitchell*, 1 Met. 22.

(17) In an action for the recovery of land and damages for its detention, the plaintiff dismissed his action for damages up to the filing of the suit. The averments of the petition did not claim damages after that time, and a judgment for \$500 damages was erroneous. *Shean v. Cunningham*, 6 Bush 123.

(18) **Right to dismiss** without prejudice at any time before submission belongs to the plaintiff absolutely, and court has no discretion in the matter. *Northwestern Ins. Co. v. Barbour*, 95 Ky. 7; and see notes 11 and 19.

(19) **Time when motion may be made.** Plaintiff has a right to dismiss without prejudice even after motion for peremptory instruction has been sustained, but before instruction is given to jury. *Vertree v. N. N. & M. V. R. R.*, 95 Ky. 314; and see notes 11, 18.

(20) **Trespassers.** Any one or all of joint trespassers may be sued, and a dismissal as to, or release of, one or more who are sued does not release the others. *Sellards v. Zomes*, 5 Bush 90; *Buckles v. Lambert*, 4 Met. 330. See further, notes to sec. 370.

§ 372. **Set-off—counter-claim.** See notes to sec. 96.

§ 373 ⁽⁴⁰³⁾ **Judgment may be against part of defendants.** Though several defendants are summoned, judgment may be rendered against any of them, if the plaintiff would have been entitled to judgments against them in an action against them alone. (*When several judgments not allowed, sec. 80.*)

§ 374 ⁽⁴⁰³⁾ **Enforcement of lien not to be postponed.** In an action to enforce a mortgage or other lien, a sale of the property may be ordered without giving time to pay money or do other act. (*Proceeding if several liens on same real property, sec. 694.*)

§ 375 ⁽⁴⁰⁴⁾ **Foreclosure of mortgage forbidden.** Foreclosure of a mortgage is forbidden.

§ 376 ⁽⁴⁰⁵⁾ **Enforcement of lien and personal judgment.** In an action to enforce a mortgage or lien, judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally. (*Form of judgment, page 649.*)

§ 373. (1) **Answer by one of several obligors.** In an action against several obligors on a contract, a plea of payment, or release, which extinguishes the demand sued on, inures to the benefit of all, and no judgment can be rendered against any of them until the plea is disposed of. But a personal plea, such as infancy, *non est factum*, or coverture by one, does not prevent judgment from being taken against the others. *Rouse v. Howard*, 1 Duv. 31.

(2) **Judgment against one of several obligors.** In an action upon a joint undertaking, judgment may be rendered against one or more of the obligors. *Moore v. Estes*, 79 Ky. 282; *Quisenberry v. Artis*, 1 Duv. 30.

(3) **Partners—judgment against one.** A creditor may, at his election, sue any or all of the members of a partnership, and a judgment against one will not be a bar to proceedings against the others. *Williams v. Rogers*, 14 Bush 776; overruling *Nichols v. Burton*, 5 Bush 320; and see *Hunt v. Simonin*, 79 Ky. 270; *Moore v. Estes*, 79 Ky. 282.

§ 374. (1) **Mortgage, security for debt only.** A mortgage is a mere security for the debt, and the mortgagor is the real owner of the property mortgaged, and is entitled to the use and profits thereof. The rents can only be claimed by the mortgagee by virtue of a contract, or when a

receiver has been appointed. *Woolley v. Holt*, 14 Bush 788. See further, notes to secs. 209; and secs. 692, 694 and notes thereto as to enforcement of liens and practice concerning.

(2) **Sale by mortgagee.** Provision in mortgage permitting sale of property by mortgagee is void. *Wilson v. Aultman*, 91 Ky. 299.

§ 375. **Foreclosure defined.** "A proceeding in chancery by which the mortgagor's right of redemption of the mortgaged property is barred forever. This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case the mortgagee may file a bill calling on the mortgagor in a court of equity to redeem his estate presently, or in default thereof to be forever barred from any right of redemption." *Bouvier Law Dict.*

§ 376. (1) **Judgment in personam and in rem.** Any rule of practice by which the assignee of notes secured by lien on land is prevented from proceeding at the same time to enforce his personal judgment and judgment *in rem* should not be adopted in case where the rights of the assignee may be jeopardized. *Chambers v. Keene*, 1 Met. 289. An assignee, to entitle himself to recover against the assignor on the contract of assignment,

§ 377 ⁽⁴⁰⁷⁾ **Set-off of judgments for money.** Judgments for the recovery of money may be set-off against each other, with due regard to the legal and equitable rights of all persons interested therein. The set-off may be ordered upon motion, after reasonable notice to the adverse party, if both judgments are in the same court; or in an equitable action in the court which rendered the judgment sought to be annulled by the set-off.

§ 378 ⁽⁴⁰⁸⁾ **Enjoining collection of judgment.** During the pendency of an action, the judgment in which when recovered could be used as a set-off against a judgment in favor of the defendants or either of them, the court, to prevent loss by insolvency, non-residence or otherwise, may enjoin the collection of the judgment in favor of such defendants, according to the provisions of chapter four of title eight.

ARTICLE 2.

JUDGMENT UPON FAILURE TO PLEAD.

§ 379. Ascertainment of facts upon failure to plead.

§ 380. Judgment for uncontroverted part of claim.

§ 379 ⁽⁴⁰⁹⁾ **Ascertainment of facts upon failure to plead.** If the taking of an account, or the proof of a fact, or the assessment of damages, be

must exhaust his remedies, both legal and equitable; and this section of the Code does not lessen the responsibility of the assignee. *Rives v. Brown*, 81 Ky. 636. See *Carlisle v. Chambers*, 4 Bush 268; 1 Met. 289.

(2) **Mortgagee of personal property—rights of.** "On a mortgage of personal property, after condition broken, the mortgagee may take possession of the mortgaged property, if he can peaceably get it, as authorized by the common law, which right has never been repealed by any statute." *Brown v. Phillips*, 3 Bush 656; and see *Brookover v. Hurst*, 1 Met. 665.

(3) **Personal judgment.** In an action to enforce a lien on land personal judgment may be rendered against the defendant, although he has not been summoned in county where action is pending. *Collins v. Park*, 93 Ky. 6.

(4) **Rents—practice**—as to when mortgagee entitled to rents, see sec. 299 and notes; as to practice, see numerous notes to secs. 692, 694.

§ 377. (1) **Set-off of judgments—attor-**

ney's lien—equitable rights. The attorney's lien attaches to the claim in litigation at the commencement of the action, and can not be defeated by setting off one judgment against another, as provided in this section. *Robertson v. Shutt*, 9 Bush 659.

(2) A judgment in the quarterly court in the form of a replevin bond may be set off against a judgment in the circuit court in an equitable action in the latter court. *Smith v. Bohon*, 12 Bush 448.

(3) The right to set off judgments can only be exercised in cases where the legal and equitable rights of all those interested in both judgments can be upheld; and where, pending an action on a note, the plaintiff assigned his claim, the assignment being filed when judgment in his favor was rendered; a judgment against the plaintiff, assigned to the defendant, could not be set off against the judgment obtained, and assigned by the plaintiff. *Pfeiffer v. Harris*, 11 Bush 400.

§ 379. **Assessment of damages—judgment.** See notes to sec. 126.

necessary to enable the court to pronounce judgment upon a failure to plead, or after a decision of an issue of law, the court may take the account, hear the proof and assess the damages; or may cause them to be assessed by a commissioner or a jury, on or after the day on which the action is set for trial.

§ 380 ⁽⁴¹⁰⁾ **Judgment for uncontroverted part of claim.** If only a part of a claim be controverted, judgment may at any time be rendered for the part not controverted.

ARTICLE 3.

JUDGMENT BY CONFESSION.

§ 381. Parties to appear in person.

§ 382. Cause of action to be stated.

§ 383. Effect of.

§ 381 ⁽⁴¹¹⁾ **Parties to appear in person.** Any person may personally appear in a court of competent jurisdiction and, with the assent of a person having a cause of action against him, confess judgment therefor; whereupon, judgment shall be entered accordingly. (*Offer to confess—effect of, sec. 640; see Ky. Stat., sec. 416.*)

§ 382 ⁽⁴¹²⁾ **Cause of action to be stated.** The cause of action shall be briefly stated in the judgment, or in a writing to be filed as pleadings in an action.

§ 383 ⁽⁴¹³⁾ **Effect of judgment.** Such judgment shall authorize the same proceedings as judgments rendered in actions, and the confession shall operate as a release of errors.

§ 380. **Judgment for uncontested amount.** A party has a right to ask judgment for the amount of his claim uncontested, without precluding himself from prosecuting his action to recover the residue claimed. *Maxwell v. Dudley*, 13 Bush

403; *Campbell v. C. S. R. W.*, 80 Ky. 585. But where part of a lien note is contested it is error to sell enough land to pay uncontested part, unless plaintiff waives his lien as to contested part. See *Sears v. Henry*, 13 Bush 413.

ARTICLE 4.

MANNER OF GIVING AND ENTERING JUDGMENT.

- § 384. Judgment in conformity to verdict—exception.
- § 385. Court to direct entry in certain cases.
- § 386. Judgment notwithstanding verdict.
- § 387. Counter-claim or set-off—judgment on.
- § 388. Specific personal property—form of judgment for.
- § 389. Damages given by statute.
- § 390. Entry on record—what to specify.
- § 391. Infant may have new trial—when.
- § 392. Judgment book to be cross indexed—how kept.
- § 393. Satisfaction to be entered—who may enter.

§ 384 ^[414] **Judgment in conformity to verdict—exception.** After a jury-trial, the clerk shall enter judgment in conformity to the verdict, unless it be special as to one or more questions of fact, or unless the court reserve the case for consideration.

§ 385 ^[415] **Court to direct entry in certain cases.** After such special verdict or such reservation the clerk shall enter such judgment or order as the court may direct.

§ 386 ^[416] **Judgment notwithstanding verdict.** Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him.

§ 384. **Verdict—judgment on.** The verdict of a jury is not a judgment, and does not terminate the action. The court must render judgment, and can not refuse to render judgment in accordance with the verdict, upon proper notice and motion made after the expiration of the time when a motion for a new trial can be made. *Fuqua v. Mullen*, 13 Bush 467.

§ 386. (1) **Judgment against the verdict.** In an action on a note, the defendant pleaded that the note was executed without consideration, and was obtained by fraud, covin and misrepresentation. The plaintiff failed to reply. The jury found a verdict for the plaintiff for the amount of the note. Held that the defendant was entitled to judgment on the pleadings, and that it was too late to file a reply after the verdict. *Evans v. Stone*, 80 Ky. 78; *Brown v. Ready*, 14 R. 583; *Mullikin v. Mullikin*, 15 R. 609.

(2) **Motion for judgment properly**

comes from the plaintiff, but should be made before judgment is entered. It is too late after a motion for new trial is overruled. *Schieble v. Hart*, 11 R. 607, and see further as to practice and waiver of right, *L. & N. R. R. v. Copas*, 95 Ky. 460.

(3) **Motion for new trial must be made within three days**, although motion for judgment, notwithstanding verdict, is pending, but the motion is not necessary in order that Appellate Court may determine whether pleadings are sufficient to authorize judgment. *Ruhrwein v. Gebhart*, 90 Ky. 147.

(4) **This section only applies where a material allegation which has been properly pleaded stands either confessed or not sufficiently denied.** *Mullikin v. Mullikin*, 15 R. 609.

(5) **Petition defective.** When the petition fails to state facts constituting a cause of action, unless its defects are cured by the answer, a judgment is unau-

§ 387 ^[417] **Counter-claim or set-off—judgment on.** If the defendant establish a set-off or counter-claim, and the plaintiff fail in his action; or if the set-off or counter-claim exceed the sum to which the plaintiff is entitled, judgment shall be rendered for the defendant accordingly. (*See further as to trial of, sec. 372.*)

§ 388 ^[418] **Specific personal property—form of judgment for.** In an action for the possession of specific personal property, the plaintiff may have judgment for its delivery, if it can be had; and, if not, for its value and for damages for its detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for the return of the property, or its value if a return can not be had, and damages for the taking and withholding of the property. (*Jury must assess value and damages, sec. 330.*)

§ 389 ^[419] **Damages given by statute.** If a party is entitled to damages given by a statute, the court shall render a judgment therefor after finding the amount thereof, or after causing them to be found by a jury.

§ 390 ^[420] **Entry on record—what to specify.** The judgment must be entered on the order-book and specify clearly the relief granted or other determination of the action.

thorized, and an appeal will be reversed. *Maddox v. Fox*, 8 Bush 402; *Liindsey v. Rutherford*, 17 B. M. 245. As to what defects in are cured by answer and verdict, see note 10 to sec. 95.

(6) **Waiver of right to move for judgment.** Where he plaintiff fails to reply to a plea of contributory neglect defendant is entitled to judgment on the pleadings; but if case is tried as if issue had been made and attention of court is not called to failure to reply, the right of defendant to move for judgment is waived. *L. & N. R. R. v. Copas*, 95 Ky. 460.

§ 387. (1) **Counter-claim — trial of.** If, upon the trial of the issue presented by a counter-claim, the jury should find damages in favor of the defendant to an amount equal to the demand of plaintiff, the verdict should be in favor of the defendant; and if they find damages of a less amount than the demand of plaintiff, they should give credit for this amount, and find for plaintiff the remainder. But if the defendant be entitled to nothing, then the plaintiff should have judgment

for his whole claim. *Moore v. Caruthers*, 17 B. M. 669. See further, notes, page 81.

(2) **Set-off.** See notes, page 83.

§ 388. (1) **Specific property — judgment.** Where the plaintiff was in possession of a stray horse that he had never posted, and had bailed him to the defendant, the plaintiff in an action to recover the horse was entitled, not to a judgment for the value of the horse, but to a judgment for the horse, if to be had, and if not, for its value. *Borron v. Landes*, 1 Duv. 299. See sec. 181 and notes thereto.

(2) Judgment should be in the alternative for the return of the property, or its value, in case a return can not be had, and damages for the taking and withholding of the property. *Rogers v. Bradford*, 8 Bush 163; *Reid v. King*, 89 Ky. 388. See further, notes to sec. 181.

§ 389. **Damages given by statute.** See *Shirley v. Landram*, 3 Bush 552.

§ 390. (1) **Amendment of judgment.** Judgments may in some cases be amended, but there must be some entry

§ 391 (421) **Infant may have new trial—when.** An infant—other than a married woman—may, within twelve months after attaining the age of twenty-one years, show cause against a judgment, unless it be for a tort done by, or for necessities furnished to, the infant; or unless it be rendered upon a set-off or counter-claim stated in an answer; but the vacation of such judgment shall not affect the title of a *bona fide* purchaser under it. (*Mode of proceedings, secs. 518 to 521; appeal by, sec. 745.*)

on the record to amend by. A paper purporting to be a decree found among the papers in a suit can not be established as a decree by parol proof. *Raymond v. Smith*, 1 Met. 65; and see notes 10 and 11, sec. 386.

(2) **Confession of.** Secs. 381, 640, and see Ky. Stat., sec. 416.

(3) **Correction of.** See notes to sec. 517.

(4) **Default judgment** in ordinary action, sec. 359; in equity action, sec. 360; for uncontested part of claim, sec. 380; against part of defendants, secs. 370, 373.

(5) **Enforcement of** after return of "no property." See sec. 439.

(6) **Evidence when to be heard before rendition of.** See secs. 126 and 379 and notes thereto.

(7) **Foreign judgments.** Faith and credit given to. *McArthur v. Goddin*, 12 Bush 274; *McElpatrick v. Taft*, 10 Bush 160.

(8) **Identification of property in.** Judgment must identify real property directed to be sold as well as specify the other duties to be performed in its execution, so that the commissioner can discharge his duties without reference to any other pleading or paper in the case. *Lawless v. Barger*, 9 Bush 665; and see *Faught v. Henry*, 13 Bush 471; *Noland v. Noland*, 12 Bush 436; *Runyon v. Darnell*, 10 Bush 67, and see notes to sec. 696.

(9) **Interest judgment bears.** Ky. Stat., sec. 2220; and see *Henderson Cotton Co. v. Lowell Machine Shops*, 86 Ky. 668, as to interest on accounts.

(10) **Judgment entered from minute-book.** Where a judgment was rendered on the last day of the term and a memorandum of it made on the minute-book and the judgment entered in vacation, the orders containing the judgment when signed by the judge at the next term become as

much the act of the court as if entered and signed at the term when rendered, and parol evidence is not admissible to show it was not so entered and signed, except in a direct proceeding to set it aside. *Bennett v. Tiernay*, 78 Ky. 580. But see *Johnson v. Com.*, 80 Ky. 377.

(11) **Judgment—what it should show.** "A judgment should show who has succeeded, what has been recovered, and from whom; or, in brief, what has been determined by the court." *Parsons v. Spencer*, 83 Ky. 305; and see further, notes to sec. 368.

(12) But a judgment which does not name the plaintiffs individually, but simply designates them as heirs, as, "adjudged that the heirs, plaintiffs in this action, recover of the defendants," is not void for uncertainty. 83 Ky. 305; see notes to sec. 368.

(13) **Modification or vacation of.** See secs. 17, 340 and 518 and notes thereto.

(14) **Presumption that judgment is correct.** *Slack v. Price*, 1 Bibb 275; *Arnold v. Paxton*, 5 J. J. M. 609; *Newcomb v. Newcomb*, 13 Bush 544.

(15) **Revivor of.** See sec. 401.

(16) **Service of process** in transitory action before rendition of. Secs. 78-82.

(17) **Variance between exhibit and petition** as to amount claimed. Judgment by default should be for amount claimed in account, but when the difference is small it will not be a reversible error to give judgment for amount asked in petition. *Francis v. Francis*, 18 B. M. 57.

§ 391. (1) **Infants—vacation of judgment against.** The rights and interests of infants are under the especial protection of courts of equity. They need not aver diligence in the preparation of their defense to the action, nor the discovery of

§ 392 ^[422] **Judgment book to be cross-indexed—how kept.** The clerk must keep a record, called judgment-book, in which all judgments shall be alphabetically cross-indexed, according to the surnames of each plaintiff and each defendant; and said book shall state the date of the judgment, the order-book and page containing it, and satisfaction of it when satisfied.

§ 393 ^[423] **Satisfaction to be entered—who may enter.** Upon the return of an execution, showing that a judgment has been satisfied, the clerk shall thus enter satisfaction on the judgment-book: satisfied by execution. A party or his attorney, receiving satisfaction of a judgment otherwise than by execution, shall make, date and sign this entry upon the judgment-book: satisfied in full. The court may, on motion, after notice, compel an entry of satisfaction to be made.

ARTICLE 5.

CONVEYANCE BY COMMISSIONERS.

§ 394. When to be made—effect of death of party.

§ 395. Deed to refer to judgment and proceedings.

§ 396. Character of title passed under judgment.

testimony, nor any of the special grounds for which new trials may be granted to adults. It is enough that they were infants at the time of the rendition of the judgment, and that it is unjust according to the facts presented by them, and that they apply for relief within the prescribed time. *Allen v. Troutman*, 10 Bush 61; *Newland v. Gentry*, 18 B. M. 666.

(2) Burden is upon infant to show that his substantial rights have been prejudiced by the judgment he is seeking to vacate. *Park v. Bolinger*, 10 R. 303.

(3) Where several infants have a joint cause of action, the fact that the action is not brought within a year after one of them arrived at age is no bar to the rights of the others who sued within the prescribed time. *Allen v. Troutman*, 10 Bush 61.

(4) Infant may have judgment vacated before he becomes of age. *Moss v. Hall*, 79 Ky. 40; *Park v. Bolinger*, 10 R. 303; 18 B. M. 666; 10 Bush 61.

(5) When an infant, after arriving at the age of twenty-one, prosecutes an ap-

peal to have reversed a judgment rendered against her during infancy as to any matter which was, or could have been, heard on the appeal, the judgment of affirmance is a bar to a petition filed in the Circuit Court to vacate the judgment appealed from. *Speak v. Mattingly*, 4 Bush 310.

(6) Infant may appeal from a judgment against him at any time during his minority, and an appeal taken during infancy will be a bar to any appeal after arriving at age. *Moss v. Hall*, 79 Ky. 40.

(7) **Limitation.** Right of infant under this section to show cause against judgment is limited to twelve months after arriving at age. *Keller v. Wilson*, 90 Ky. 350.

(8) **Mode of proceeding to vacate judgment.** Where the condition of the defendant nor the error does not appear in the proceedings, the judgment may be vacated, as provided in sec. 518-5. Where the condition of the infant appears in the record, but the error does not, the court can vacate the judgment, as provided in this section. *Richards v. Richards*, 10 Bush 617.

- § 397. Title passed under order of sale.
§ 398. Deed to be examined and approved by court.
§ 399. Names of parties in deed—commissioner to sign.
§ 400. County to be recorded in.

§ 394 ⁽⁴²⁴⁾ **When to be made—effect of death of party.** Real property may be conveyed by a commissioner appointed by the court—

1. If by the judgment in an action a party be ordered to convey such property to another.

2. If such property have been sold under a judgment or order of the court and the sale confirmed.

3. The death of a party, after a sale, does not prevent a conveyance. It shall be made, and shall have the same effect, as if he were living. (*See further as to conveyance after death of party, Ky. Stat., sec. 521.*)

§ 395 ⁽⁴²⁵⁾ **Deed to refer to judgment and proceedings.** The deed of the commissioner shall refer to the judgment, orders and proceedings, authorizing the conveyance, so that the same may be readily found.

§ 396 ⁽⁴²⁶⁾ **Character of title passed under judgment.** A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land.

§ 397 ⁽⁴²⁷⁾ **Title passed under order of sale.** A conveyance made in pursuance of a sale ordered by the court shall pass the grantee the title of all the parties to the action or proceeding.

§ 398 ⁽⁴²⁸⁾ **Deed to be examined and approved by court.** A conveyance by a commissioner shall not pass any right, until it has been examined and approved by the court—which approval shall be indorsed on the conveyance, and recorded with it.

§ 399 ⁽⁴²⁹⁾ **Names of parties in deed—commissioner to sign.** It shall be necessary for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed; but the names of such parties shall be recited in the conveyance.

§ 400 ⁽⁴³⁰⁾ **County to be recorded in.** The conveyance shall be recorded where, by law, it should have been recorded, had it been made by the parties whose title is conveyed by it. (*See Ky. Stat., sec. 495.*)

§ 394. **Confirmation of sale.** An order confirming a report of sale is not equivalent to a judgment directing a conveyance of the property. *Gill v. Hewett*, 7 Bush 10. If any of the parties to the action die after a sale is confirmed, and before the conveyance of the property, it is not necessary to revive the action. *Ky. Stat., sec. 521*; but if defendant dies be

fore sale is confirmed there must be a revivor or sale will be void. *Wheatley v. Hays*, 6 R. 517; *Barbee v. Fox*, 79 Ky. 588.

§ 398. **Deed must be approved by court.** The deed of the commissioner does not pass title until it has been approved by the court. *Dickerson v. Talbot*, 14 B. M. 60; see *Miller v. Hall*, 1 Bush 229.

CHAPTER IV.

REVIVOR OF JUDGMENTS.

- § 401. Execution may issue until barred by limitation.
- § 402. Execution after death of plaintiff.
- § 403. Who treated as plaintiff by sheriff.
- § 404. Affidavit to procure issual after death of plaintiff.
- § 405. Execution against surviving defendant.
- § 406. Execution improperly issued quashed or enjoined.
- § 407. Death of execution defendant—effect of—revivor.

§ 401 ^[401] **Execution may issue until barred by limitation.** An execution may be issued upon a judgment at any time until the collection of it is barred by the statute of limitations, although no execution may have been previously issued within a year and a day.

§ 402 ^[402] **Execution after death of plaintiff.** The death of a party, after recovering a judgment, shall not prevent the issuing of an execution afterward; but—

1. Upon a judgment recovered by one party, execution issued after his death must be in favor of his representative or successor who is entitled to the property for which the judgment was rendered.

2. Upon a judgment recovered by several parties, execution issued after the death of one must be in favor of the other.

3. Upon a judgment recovered by several parties, execution issued after the death of all of them must be in favor of the last survivor's representative or successor who would have been entitled to the property if the judgment had been recovered by such survivor only.

4. The clerk shall indorse on the execution the names of the decedent and of such survivor, representative or successor.

5. An execution issued in favor of a survivor, representative or successor of a decedent shall be subject to the control of the court whence it issued for the protection of any person interested therein.

§ 402. (1) **Death of plaintiff in execution** does not actually abate either the judgment or the execution, but it suspends all proceedings on the execution until administration is granted, and the clerk authorized to make the proper indorsements thereon, as provided; and a replevin bond taken after the death of the

plaintiff and before the indorsement is made is void. *Venable v. Smith*, 1 Duv. 195; *Morgan v. Winn*, 17 B. M. 233.

(2) **Death of plaintiff in judgment.** Defendant need not have judgment revived in order to prosecute an appeal. *Hopkins v. Hopkins*, 91 Ky. 310.

(3) **Lien not released.** The lien created

§ 403 [433] **Who treated by sheriff as plaintiff.** Upon such execution, the person entitled thereto, according to the indorsement of the clerk, shall be treated by the sheriff as the plaintiff therein.

§ 404 [434] **Affidavit to procure issual after death of plaintiff.** The clerk, before making the indorsements required by subdivision four of section four hundred and two, shall require the person claiming right thereto to file an affidavit showing his right. If the affiant state that he is a personal representative or successor of a decedent, the clerk shall also require him to file a copy, properly certified, of his appointment, as such, by a competent tribunal in the United States; and, unless the appointment was made in Kentucky, the clerk shall also require of him a covenant, with good surety, that he will dispose, according to law, of any property which he may receive upon the execution. If the affiant state that he is a devisee of a decedent, the clerk shall require him to file a copy of the will, certified by a clerk of a county court in this State in which the will or a copy is recorded.

§ 405 [435] **Execution against surviving defendant.** The death of a defendant shall not prevent the issuing of an execution against a surviving defendant.

§ 406 [436] **Execution improperly issued quashed or enjoined.** The court may, after reasonable notice, quash an execution, on the ground that the representative or successor of a deceased plaintiff is not properly stated in the indorsement on the execution; and during vacation of the court the defendant may obtain an injunction, upon its being made to appear that the persons named are not entitled to the judgment on which the execution was issued.

§ 407 [437] **Death of execution defendant—effect of—revivor.** 1. The death of a defendant after a sale of his property under execution shall not prevent a conveyance of the property. It shall be conveyed in the same manner, and with the same effect, as if he were living.

2. The levy of an execution is not discharged by the death of the defendant; but is suspended according to the provisions of the next following subsection.

by the levy of the execution is not released by the death of the plaintiff, if within a reasonable time after his death steps are taken to enable the clerk to make the proper indorsement. *Morgan v. Winn*, 17 B. M. 233.

§ 405. **Death of defendant — effect of.** When one of the execution defendants has died, the fact that the judgment has

been destroyed does not prevent the issual of an execution against the survivors when the record is supplied. *Fleece v. Goodrum*, 1 Duv. 306.

§ 407. (1) **Death of the owner of land levied on—effect of.** The death of the owner of land levied on after the levy and before sale passed the whole title to his heirs, and, without a revivor against

3. A judgment, or the levy of an execution, may be revived against the personal representative or successor of a defendant after the lapse of six months from the time of the qualification of his first representative; and, against a real representative, after the lapse of twelve months from the time of the death of the defendant. If, however, owing to the perishable nature of the property levied on, or the cost of keeping it, a sale of it would be beneficial, the court, or the judge in vacation, may so order; and the proceeds shall be held subject to the order of the court on the rule for a revivor.

4. The revivor may be made upon a rule in the action, ten days' notice of which shall be served in the same manner as a summons. The motion for revivor shall be docketed and tried as other motions; the court may hear it during any day of the term; and may cause execution to issue without delay. (*How action revived, secs. 500 to 512; who is "successor," sec. 732-20.*)

them, a sale of it under the execution will be void. *Huston v. Duncan*, 1 Bush 205; *Holeman v. Holeman*, 2 Bush 514; *Burge v. Brown*, 5 Bush 535.

(2) The death of the execution defendant after the levy and before the sale does not release the lien created by the levy, and the lien may be enforced in equity, as other demands are against the estate of the decedent. *Burge v. Brown*, 5 Bush 535; 2 Bush 514.

(3) **Insane person—revivor of judgment against.** A judgment against a person who subsequently becomes insane may

be revived against him and his committee. An execution can not be levied on the property of a person after he is found to be of unsound mind. *McNees v. Thompson*, 5 Bush 686.

(4) **Judgment must be verified.** A judgment must be verified, as other claims against the estate of decedents, before it can be revived. *Curry v. Bryant*, 7 Bush 301.

(5) **Replevin bonds—revivor of.** Replevin bonds may be revived in the manner provided in this section. *Chinn v. Harrodsburg*, S. I. 8 Bush 290.

TITLE X.

PROCEEDINGS IN CERTAIN ACTIONS.

- CHAPTER I. ACTIONS AGAINST ABSENT AND UNKNOWN DEFENDANTS, 408.
- II. ALIMONY AND DIVORCE, 420.
- III. SETTLEMENT OF TRUST AND DECEDENT'S ESTATES, 428.
- IV. ENFORCING THE SATISFACTION OF JUDGMENTS, 439.
- V. SUMMARY PROCEEDINGS, 444.
- VI. CIVIL PROCEEDINGS ON BEHALF OF THE COMMONWEALTH, 450.
- VII. ARBITRATIONS AND AWARDS, 451.
- VIII. FORCIBLE ENTRY AND DETAINER, 452.
- IX. PROBATE OF WILLS, 470.
- X. SETTLEMENT OF ACCOUNTS OF FIDUCIARIES BY COUNTY COURT, 471.
- XI. CAVEATS, 473.
- XII. WRITS OF MANDAMUS AND PROHIBITION, 474.
- XIII. REPEALING AND VACATING CHARTERS, AND PREVENTING THE USURPATION OF AN OFFICE OR FRANCHISE, 480.
- XIV. SALE OF REAL PROPERTY OF PERSONS UNDER DISABILITY, 489.
- XV. DIVISION OF LAND AND ALLOTMENT OF DOWER, 499.

CHAPTER I.

ACTIONS AGAINST ABSENT AND UNKNOWN DEFENDANTS.

- § 408. Time allowed to defend.
- § 409. Petition against when taken as true.
- § 410. Bond to be executed before judgment.
- § 411. Court to control property if bond not given.
- § 412. Plaintiff may be examined touching his claim.
- § 413. Set-off or counter-claim disclosed allowed.
- § 414. Time allowed for new trial except as to divorce.
- § 415. Copy of judgment served on defendant—effect of.
- § 416. Manner of serving copy of judgment.
- § 417. Title of property, how affected by new trial.
- § 418. Lien created only by attachment or judgment.
- § 419. Personal judgment forbidden.

§ 408 (1888) Time allowed to defend. A defendant constructively summoned shall be allowed at any time before judgment to appear and

§ 408. (1) Compliance with law necessary. In all proceedings upon constructive service the provisions of the Code regulating the same must be literally followed. Nothing short of a substantial compliance with every prerequisite will give the court jurisdiction of the property sought to be subjected to the payment of the plaintiff's claim. *Brownfield v. Dyer*, 7 Bush 505.

(2) Corporation. A corporation can not have two domiciles at the same time, and a corporation created by the laws of Ohio was properly sued as a non-resident, although it may have been incorporated by the same name by the Legislature of this State. *N. & C. B. Co. v. Woolley*, 78 Ky. 523.

(3) Defense—when may be made. Non-residents not served with process may ap-

defend the action; and, upon a substantial defense being disclosed, time may be given on reasonable terms to prepare for trial. (*How unknown defendant described, sec. 691; venue of action against, sec. 75; provisions concerning constructive service, secs. 57 to 62.*)

§ 409 ⁽⁴⁰⁰⁾ **Petition against when taken as true.** In an action against a defendant constructively summoned, if the plaintiff file with the petition his own affidavit stating that any of the allegations thereof recited in the affidavit are true, and known to be so by the defendant, and that they can not be proved or shown otherwise than by his answer, so far as the affiant knows or believes, such allegations, unless denied by the answer, shall be taken as true. (*Otherwise must be proved, sec. 126; how action against revived, sec. 504.*)

§ 410 ⁽⁴¹⁰⁾ **Bond to be executed before judgment.** Before judgment is rendered against a defendant constructively summoned and who has not appeared, a bond shall be executed, with good surety approved

pear at any time before final judgment and make defense or assert claim to affirmative relief. *Crowley v. Vaughan*, 11 Bush 517.

(4) **Non-resident—attachment against.** Sec. 194 and notes.

(5) **Warning order—corresponding attorney.** Secs. 57, 58 and notes.

§ 409. (1) **Proof of writing sued on not necessary.** It is not necessary to prove the execution of a note sued on, although it may not have been assigned to the plaintiff. *Buckner v. Bush*, 1 Duv. 394; *Gill v. Johnson*, 1 Met. 649. Nor the execution of deeds alleged to have been made by the defendant. *Barrett v. Coburn*, 3 Met. 511, and see *Ball v. Poor*, 81 Ky. 26.

(2) In an action against a non-resident to enforce a lien on land for the purchase money, the plaintiff alleged that the first payment had been made, and filed a deed, which had never been delivered, reciting the payment. In an amended petition it was alleged that no part of the first payment had been paid. Held that the allegations of the amended petition could not be taken for confessed. *Jackson v. Speed*, 2 Duv. 426.

(3) **Proof of non-residency.** It was held under the Code of 1854 that it was necessary to prove that the defendant was a non-resident. *Johnson v. McElroy*, 2 Bush 132; *Buckner v. Bush*, 1 Duv. 394.

But see sec. 58-6, which was not in that Code.

(4) **Statements which this section provides** may be made in an affidavit can be made in the petition if it is verified. *Tipton v. Wright*, 7 Bush 448.

§ 410. (1) **Appearance—what is.** Where a non-resident defendant filed an answer, sworn to by him, controverting the allegations of the petition, it entered his appearance and a personal judgment was proper, although he expressly stated in the answer that it was filed without entering his appearance. An answer can not be filed without entering the appearance of the defendant. *Tipton v. Wright*, 7 Bush 448.

(2) The filing of an affidavit controverting the grounds upon which an attachment issued is an appearance to the action. *Duncan v. Wickliffe*, 4 Met. 118; and the execution of a bond to discharge the attachment enters appearance, sec. 600; as does filing exceptions to commissioner's report. *Trimble v. Hunt*, 15 R. 707.

(3) The prosecution of an appeal is an appearance to the action, and upon the return of the case to the Circuit Court no bond to the non-resident is necessary. *Gill v. Johnson*, 1 Met. 649; *Allen v. Brown*, 4 Met. 342.

(4) An appeal taken in the name of and for a non-resident without his consent

by the court, to the effect that, if the defendant shall procure a vacation or modification of the judgment, the person in whose favor it was rendered shall restore to the defendant any property or money obtained under such judgment, restoration of which shall be adjudged. If the judgment be in favor of persons having distinct interests, such bond may be executed for each, according to his interest. [This and succeeding sections shall not apply in actions in which the Commonwealth is a party plaintiff, and is the beneficial owner of the demand sought to be collected.] (*Words in brackets added by act 1888. Form of bond, page 626; personal property must be first sold, sec. 230; executing bond in attachment case enters appearance, sec. 690.*)

§ 411 [442] **Court to control property if bond not given.** If the bond mentioned in section four hundred and ten be not given, the court may enter a judgment ascertaining the rights of the parties; but shall retain control over and preserve any money or property, or the proceeds thereof, which may have been attached in the action, until the expiration of the period allowed to the defendant to appear and make defense—when, if no defense be made, such money or property or its proceeds shall be delivered according to the judgment. (*See reference to act 1888, sec. 410, et seq.*)

does not enter his appearance. *Parks v. Cooke*, 3 Bush 168.

(5) One who has been constructively summoned, and appears for the first time by appealing from the judgment against him, will only be held to have appeared in the court below on the day the mandate is entered, and no judgment can be rendered against him at that term. *Beazley v. Maret*, 1 Bush 466.

(6) An attorney for the plaintiff should not be allowed in any case to enter the appearance of a non-resident defendant even under a power of attorney. *Ball v. Poor*, 81 Ky. 26.

(7) **Bond to be executed.** A judgment against a non-resident who has not appeared before the bond required by this section is executed is erroneous. *Allen v. Brown*, 4 Met. 342; *Harris v. Adams*, 2 Duv. 141; *Anderson v. Sutton*, 2 Duv. 490. The bond must be taken and approved by the court, and an order, directing the payment of the money attached upon the execution of the bond, before the clerk in vacation is unauthorized. *Gill v. Johnson*, 1 Met. 649; and the bond must be executed whether real or per-

sonal property is sought to be subjected. *Morrison v. Beckham*, 16 R. 294.

(8) **Bond—rights of purchaser.** When a sale, made under proceedings against a non-resident, is set aside, the persons who have received the money under it should be required to refund, and in ordering a resale of the property the purchaser at the first sale should be given priority over all other parties, as the bond executed to the non-resident does not secure to the purchaser a return of his money if the sale is set aside. *Salter v. Dunn*, 1 Bush 311.

(9) **Bond not required—when.** Where a judgment obtained by a non-resident is enjoined, it is not necessary to execute the bond required by this section. *Fellows v. Day*, 5 Bush 666.

(10) **Vendor and vendee.** The purchaser of land, who has been put in possession by a decree, and who is compelled to proceed against a non-resident to have his title perfected, may require of his insolvent vendor a bond of indemnity to protect him against any claim the non-resident may assert within five years, before he is compelled to pay the purchase money. *Denny v. Wickliffe*, 1 Met. 216.

§ 412 ^[443] **Plaintiff may be examined touching his claim.** Before rendering judgment against a defendant constructively summoned and who has not appeared, the court may cause the plaintiff to appear personally in court, or before a commissioner, and answer, under oath, interrogatories concerning the statements of the petition, or any defense thereto, including set-offs or counter-claims, and may order the examination to be reduced to writing and filed with the papers of the action.

§ 413 ^[444] **Set-off or counter-claim disclosed allowed.** If, upon such examination, any set-off or counter-claim be disclosed, it may be adjusted and allowed in the judgment.

§ 414 ^[445] **Time allowed for new trial except as to divorce.** A defendant against whom a judgment may have been rendered upon constructive service of a summons, and who did not appear, may, at any time within five years after the rendition of the judgment, move to have the action retried; and, security for the costs being given, shall

§ 414. (1) **Appeal by—effect of.** A defendant, constructively summoned, may prosecute an appeal and have the judgment reversed, but if he elects to appeal he is bound by the judgment of the lower court as much as if he had been served with process, and is precluded from having a new trial as provided in this section. *Salter v. Dunn*, 1 Bush 311. A motion must be made to set aside judgment before an appeal can be prosecuted, sec. 763.

(2) The right to have a retrial within five years does not divest a non-resident of the right to appeal, and obtain a reversal for errors apparent in the record. If the judgment is apparently regular and proper, but was unjustly obtained, the proper remedy is by motion in the Circuit Court. *Payne v. Witherspoon*, 14 B. M. 270; 1 Bush 466. But see sec. 763, and notes thereto.

(3) "Defendants, constructively summoned, have alternate remedies to retry the cause: First, by proper proceedings in the court below, second, by an appeal to this court, but not by both remedies, and in the two courts, at the same time." *Speak v. Mattingly*, 4 Bush 310.

(4) **New trial—how obtained.** A defendant is not entitled to a new trial until he moves to have the action retried, gives bond for costs and presents a defense;

and it is only after his defense is sustained, in whole or in part, that the court has power to set aside the judgment. *Williams v. Taylor*, 11 Bush 375.

(5) Although the defendants did not make a formal motion to have the action retried, they gave security for costs, and filed their pleadings of record, and these steps are sufficient to enter their appearance and motion. *Barbee v. Fox*, 79 Ky. 588.

(6) **Rights of when judgment modified.** When a sale of a non-resident defendant's property has been made under a judgment, he may, upon succeeding in even modifying the decree, elect to vacate the sale; and he has the same right when he takes an appeal and the judgment against him is reversed. *Jackson v. Speed*, 2 Duv. 426; *Lusk v. Salter*, 1 Bush 311.

(7) **Sale—exceptions to.** Where a non-resident appeared and moved for a retrial more than five years after the sale of the property in an action to foreclose a mortgage, but within five years after the sale was confirmed, the sale may be set aside; and when exceptions are filed, the non-resident has the right to avail himself of every objection that could have been made if he had been actually served with process. 79 Ky. 588; 11 Bush 375.

be admitted to make defense; and thereupon the action shall be retried, as if there had been no judgment; and, upon the new trial, the court may confirm the judgment or modify or set it aside; and may order the plaintiff to restore any money of such defendant paid to him under it, or any property of the defendant obtained by the plaintiff under it and yet remaining in his possession, and pay to the defendant the value of any property which may have been taken under an attachment in the action, or under the judgment, and not restored. But this section does not apply to judgments for divorce, so far as the divorce is concerned. [When the Commonwealth shall have received money under a judgment, which may thereafter be modified or set aside under the provisions of said section upon a retrial, the court, in making the order for the restoration of such money, shall direct the Auditor of Public Accounts to draw his warrant upon the Treasurer for the proper amount in favor of the party in whose favor the order of restoration may be made, and it shall thereupon become the duty of the Auditor to draw his warrant in obedience to such order.] (*Words in brackets added by act 1888; see sec. 763.*)

§ 415 [446] **Copy of judgment served on defendant—effect of.** The plaintiff may, after the judgment, cause a certified copy thereof to be served on a defendant constructively summoned, excepting infants—other than married women—and persons of unsound mind and prisoners; whereupon, the period in which such defendant is allowed to appear and have a new trial shall be reduced to one year after such service.

§ 416 [447] **Manner of serving copy of judgment.** Service of the copy of a judgment in this State shall be made and proved in the same manner as the service of a summons; and, if out of this State, in the manner prescribed in section fifty-six as to the service of a copy of the petition and summons and proof thereof.

§ 417 [448] **Title of property—how affected by new trial.** The title of purchasers in good faith to any property sold under an attachment or judgment shall not be affected by the new trial permitted by section four hundred and fourteen, except the title of property obtained by the plaintiff and not bought of him in good faith by others.

§ 417. (1) **Purchaser of property.** An attorney for the plaintiff, in an action against a non-resident, who purchases the property of the non-resident at the sale under the judgment, is not a purchaser in good faith; and his voluntary conveyance of it to his children does not make them *bona fide* purchasers, or defeat

(15)

the defendant's right to restoration. *Lusk v. Salter*, 1 Bush 311.

(2) A stranger may in good faith buy the property from the plaintiff before the defendant has entered his appearance and moved for a retrial, and he will be protected. *Kellar v. Stanley*, 86 Ky. 240.

(3) By "good faith" is meant a pur-

§ 418 ^[448] **Lien created only by attachment or judgment.** No lien on the property of a defendant constructively summoned shall be created otherwise than by an attachment as is provided in chapter three of title eight or by judgment; nor shall any person be restrained from paying or delivering any money or property in his hands belonging or due to such defendant, by notice indorsed on the summons, or otherwise than by attachment or judgment.

§ 419 ^[450] **Personal judgment forbidden.** No personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this State as provided in section fifty-six, and who has not appeared in the action.

CHAPTER II.

ALIMONY AND DIVORCE.

[SEE FURTHER PROVISIONS IN KY. STAT., SECTION 2117.]

- § 420. Action to be equitable.
- § 421. Verification of pleadings—Interrogatories.
- § 422. Statements of petition to be proved—residence of parties, proof of.
- § 423. Allegations and proof necessary.
- § 424. Maintenance during action.

chase not merely for a consideration but also without notice to the purchaser of an adverse claim to the property by others. 86 Ky. 240.

§ 418. (1) **Attachment necessary to create lien—when.** In an action to subject real estate owned by a defendant constructively summoned, the levy of an attachment is not necessary to give the court jurisdiction to sell the property, if the plaintiff has a contract lien, or a lien by virtue of a statute, on the property. In an action upon a return of no property, an attachment is not necessary to give jurisdiction, or create a lien, if the property sought to be subjected is specifically described in the petition. *Trabue v. Conners*, 84 Ky. 283.

(2) **Attachment—when necessary to give jurisdiction.** An attachment is necessary to give the court jurisdiction in an ac-

tion against a defendant constructively summoned, unless a lien is asserted. If the plaintiff has no contract or statutory lien on the property, unless an attachment be obtained, the judgment of sale will be void. A lien is not created by the judgment. *Grigsby v. Barr*, 14 Bush 330; *Green v. Wilson*, 8 R. 601; see *Peters v. Conway*, 4 Bush 565 and note 1.

(3) **Equitable interest in real property** owned by a non-resident is subject to attachment. *Bank of Lou. v. Barrick*, 1 Duv. 51.

§ 419. **Personal judgment forbidden.** A personal judgment can not be rendered against a defendant constructively summoned, and who has not appeared. *Harris v. Adams*, 2 Duv. 141; *Griswold v. Popham*, 1 Duv. 170; *Berry v. Berry*, 6 Bush 594; 2 Duv. 426; 14 B. M. 270.

§ 425. Restoration of property—proceedings to enforce.

§ 426. Annulment of judgment granting divorce.

§ 427. Divorce from bed and board—how annulled.

§ 420 ⁽⁴⁸⁷⁾ **Action to be in equity.** An action for alimony or divorce shall be in equity. (*Venue of action, sec. 76.*)

§ 421 ⁽⁴⁸⁸⁾ **Verification of pleadings—interrogatories.** The pleadings are not required to be verified. But either party may file interrogatories to the other, in regard to questions of property involved in the action, which shall be answered on oath, as interrogatories in other actions, and have the same effect. (*Provisions concerning interrogatories, secs. 140 to 152.*)

§ 422 ⁽⁴⁸⁹⁾ **Statements of petition must be proven—residence of parties, proof of.** The statements of a petition for a divorce shall not be taken as true because of the defendant's failure to answer, or admission of their truth; and the facts as to residence of the parties must be proved by [one or more credible witnesses]. (*Words in brackets added by act 1892.*)

§ 423 ⁽⁴⁹⁰⁾ **Allegations and proof necessary.** The plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce—

1. A residence in this State for one year next before the commencement of the action.

§ 420. (1) **Alimony.** A husband filed petition for divorce, and his wife asked also for a divorce on grounds set up in a counter-claim. The lower court granted husband divorce, dismissing counter-claim; on appeal the court held that wife was entitled to alimony, although divorce was obtained by husband. *Davis v. Davis*, 86 Ky. 32; and see, further, notes to sec. 2117, Ky. Stat., and notes to sec. 424, Code.

(2) A separate action for alimony may be maintained. The provisions of the Code in regard to residence do not apply to actions for alimony. *Hulett v. Hulett*, 80 Ky. 364.

(3) **Appeal.** Court of Appeals has no revisory power over judgments granting divorce, even from bed and board. *Evans v. Evans*, 93 Ky. 510; *Irvin v. Irvin*, 16 R.—.

(4) **Jury trial not necessary.** The trial of the issues of fact by a jury in a divorce case is not necessary. 13 Bush 544; Ky. Stat. 2117.

§ 422. (1) **Credible witnesses** are persons not disqualified by mental imbecility, interest or crime from giving testimony in a court of justice. *Fuller v. Fuller*, 83 Ky. 345.

(2) **Evidence—one witness.** In an action for a divorce on the ground of abandonment, or any other charge except lewdness or adultery, the testimony of one witness may be regarded as sufficient to sustain it. *Stibbins v. Stibbins*, 1 Met. 476. See Ky. Stat., sec. 2119, and notes thereto, as to proof required to sustain charge of adultery or lewdness.

§ 423. (1) **Abandonment.** In a suit by the wife for divorce the court can not on the cross-petition of the husband grant him a divorce on the ground of abandonment, unless the abandonment has continued for a year before the filing of the cross-petition. *Lee v. Lee*, 1 Duv. 196; and it must be alleged and proved that the abandonment was without fault of party applying for divorce. *Epling v.*

2. That the cause of divorce occurred or existed in this State, or, if out of the State, either that it was a legal cause of divorce in the State where it occurred or existed, or that the plaintiff's residence was then in this State.

3. That the cause of divorce occurred or existed within five years next before the commencement of the action.

§ 424 ^[441] **Maintenance during action.** During the pendency of an action for divorce or alimony, the court may allow the wife maintenance, and enforce the payment thereof by orders and executions and proceedings as in cases of contempt.

Epling, 1 Bush 74; Owsley v. Owsley, 1 R. 124; Self v. Self, 1 R. 356.

(2) The wife is not entitled to a divorce on the ground of abandonment committed in another State, unless it is proved that abandonment was a cause of divorce there. Hick v. Hick, 5 Bush 670; Becket v. Becket, 17 R. M. 370.

(3) Witnesses testifying to an abandonment should not be allowed to give their opinions, but should be required to give the facts and circumstances. Self v. Self, 1 R. 356.

(4) Refusal of husband to live or cohabit with his wife amounts to abandonment, although they sleep beneath the same roof. Evans v. Evans, 93 Ky. 510.

(5) **Grounds of divorce.** See Ky. Stat., sec. 2117.

(6) **Insanity** is not ground for divorce, and husband is not entitled to divorce from his wife, although she has been confined in an asylum more than five years.

• Pile v. Pile, 94 Ky. 308.

(7) **Jurisdiction.** The action must be brought in the county where the wife usually resides, if she have an actual residence in this State, if not, in the county of the husband's residence (Ky. Stat., sec. 2120); but the right to object to the jurisdiction may be waived. Johnson v. Johnson, 12 Bush 485.

(8) **Residence.** The allegation in the petition that the plaintiff "now resides and for some while has resided in Garrard county" is equivalent to the expression "usually resides" contained in sec. 76 of the Code. Lochnane v. Lochnane, 78 Ky. 467; and see Strode v. Strode, 3 Bush 227; and see Ky. Stat., sec. 2120.

(9) Plaintiff must allege and prove an actual and not merely a legal residence in this State for one year before commencement of action; legal and actual residence defined. Tipton v. Tipton, 87 Ky. 243.

(10) Residence of husband is deemed residence of wife. Dunlop v. Dunlop, 3 R. 20.

(11) **Wife absent in obedience to husband.** A husband can not sue his wife as a non-resident when she is absent from the State in obedience to his will, or is confined by him in an asylum or other place with no power to return or respond to a summons or warning order. Newcomb v. Newcomb, 13 Bush 544; nor is lunacy ground of divorce. Pile v. Pile, 94 Ky. 308.

(12) **Wife may sue non-resident husband.** A wife may bring an action in the county of her residence against her non-resident husband for divorce. Rhymys v. Rhymys, 7 Bush 316. See further as to jurisdiction, notes to sec. 76.

§ 424. (1) **Alimony.** A man, concealing the fact that he had a living wife, married a second wife in this State and abandoned her; the last wife, being blameless, is entitled to alimony. Strode v. Strode, 3 Bush 227.

(2) The wife may maintain a separate action for alimony. Hulett v. Hulett, 80 Ky. 364; Freeman v. Freeman, 11 R. 822.

(3) The court can not, in allowing maintenance or alimony, divest the husband of his title to his land. The use of a sufficiency of his land and the absolute title to the personality allowed is all

§ 425 ⁽⁴⁰³⁾ **Restoration of property—proceedings to enforce.** Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the

that will be held valid. *Quisenberry v. Quisenberry*, 1 Duv. 197.

(4) The fact that husband has no estate is no reason why wife should not be granted alimony, the husband should be required to contribute a part of his earnings. *Canine v. Canine*, 13 R. 124.

(5) Wife is not entitled to alimony unless she is separated from bed and board of her husband. *Freeman v. Freeman*, 11 R. 822.

(6) Where husband obtains divorce on ground that he and his wife have lived apart five years, she is entitled to alimony and attorney fees and costs. *Newsome v. Newsome*, 95 Ky. 383; and the same rule applies in all cases where he obtains a divorce without her fault. *Lacey v. Lacey*, 95 Ky. 110.

(7) **Appeal—maintenance.** An appeal may be taken from a judgment making an allowance to support the wife pending a suit for divorce. The question as to the residence of the parties will not be inquired into upon an application for maintenance pending the action. No notice of the application for an allowance is necessary when the petition specifically asks such an allowance. Oral evidence may be heard on the application. *Lochnane v. Lochnane*, 78 Ky. 467. See further, as to costs, Ky. Stat., sec. 900; and as to alimony and maintenance, Ky. Stat., secs. 2121-2124.

(8) Amount of alimony that should be allowed, see Ky. Stat., secs. 2122, 2124, and *Newsome v. Newsome*, 95 Ky. 383; *Lacey v. Lacey*, 95 Ky. 110; *Beal v. Beal*, 80 Ky. 675; *Quisenberry v. Quisenberry*, 1 Duv. 197; *Cravens v. Cravens*, 4 Bush 435; as to attorney fees see *Cravens v.*

Cravens, 4 Bush 435; *Whitney v. Whitney*, 7 Bush 520; *Thomas v. Thomas*, 7 Bush 665; *Burgess v. Burgess*, 1 Duv. 287; *Ballard v. Caperton*, 2 Met. 412.

(9) Wife may make creditors of her husband a party to her action for alimony in order that she may recover amount allowed her from them. *Cain v. McHarvy*, 2 Bush 263.

(10) Wife who has received property under a contract with her husband involving their separation must account for it in a suit by her for alimony. *Evans v. Evans*, 93 Ky. 510.

§ 425. (1) **Change in law.** The Code of 1854, sec. 462, provided that "each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof." The Gen. Stat., chap. 52, art. 3, sec. 6 (now Ky. Stat., sec. 2121), contains substantially the same provision. See, construing this statute, *Williams v. Gooch*, 3 Met. 487; *Philips v. Philips*, 9 Bush 183, and observe the change made by this Code.

(2) **Divorce bars dower.** A divorce bars all right of the wife to dower in land conveyed by her husband during marriage, and in that of which he may die possessed. *McKean v. Brown*, 83 Ky. 208; *Hawkins v. Ragsdale*, 80 Ky. 353.

(3) **Restoration of property—gifts.** Gifts from the husband to the wife will not be restored to him in her suit against him in which she obtains a divorce from bed and board. *Orr v. Orr*, 8 Bush 156; and see further, as to restoration of property, *Golden v. Golden*, 82 Ky. 51.

same in a summary manner, after ten days' notice to the party so failing. (*Judgment can not be set aside after term, sec. 344; nor can appeal be taken from judgment granting, Ky. Stat., sec. 950.*)

§ 426 ⁽⁴⁰³⁾ **Annulment of judgment granting divorce.** A judgment of divorce from the bond of matrimony may be annulled by the court which rendered it, upon a petition verified by the parties in person so requesting.

§ 427 ⁽⁴⁰⁴⁾ **Divorce from bed and board—how annulled.** A judgment of divorce from bed and board may be annulled by the court which rendered it, at the instance of either party showing just cause therefor in an equitable action.

CHAPTER III.

SETTLEMENT OF TRUST ESTATES AND ESTATES OF DECEASED PERSONS.

§ 428. Who may institute action—necessary parties.

§ 429. Averments of petition—sale of real estate.

§ 430. Reference to commissioner—notice to creditors.

§ 431. Order of reference in vacation—clerk may make.

§ 432. Creditor presenting claim becomes party.

§ 433. Creditor failing to present claim—effect.

§ 434. Legatees and distributees liable to creditor.

§ 435. Refunding bond required of distributees and legatees.

§ 436. Creditors may be enjoined from suing.

§ 437. Affidavit and demand necessary—exception.

§ 438. Provisions of this chapter applicable to trust estates.

§ 428 ⁽⁴⁰⁵⁾ **Who may institute action—necessary parties.** 1. A represent-

(4) A divorce restored to the wife land owned by her and which her husband had conveyed during their marriage. *Hays v. Sanderson*, 7 Bush 489.

(5) To compromise a suit for divorce the husband conveyed to trustees for the use of his wife and children a tract of land, and by the judgment of the court a divorce from bed and board was rendered. Afterward the husband obtained an absolute divorce. His petition subsequently filed to have the trust deed set aside was properly dismissed, the property not having been received in consideration of or by reason of marriage. *Flood v. Flood*, 5 Bush 167.

(6) The order of restoration contemplated by this section is a formal one,

and was not intended to settle any controversy concerning the property. Questions about the property are to be settled by subsequent proceedings. *Williams v. Gooch*, 3 Met. 487. See further, *Bennett v. Bennett*, 95 Ky. 545, in which it is doubted if this section applies to property about which an issue is made as to how it was acquired.

(7) **Settlement in contemplation of separation.** A conveyance made by the husband to trustees for the use of the wife, in contemplation of an immediate separation between them, is valid. *Gains v. Poor*, 83 Met. 503; *Loud v. Loud*, 4 Bush 453; and see *Evans v. Evans*, 93 Ky. 510.

§ 428. (1) **Action to settle estate** may be brought within less than six months from

ative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate.

2. The representatives of the decedent and all persons having a lien upon, or an interest in, the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants. (*Venue of action, secs. 65, 66. Meaning of "representative," sec. 732—18, 19.*)

§ 429 ^[400] **Averments of petition—sale of real estate.** In such an action, the petition must state the amount of the debts, and the nature and value of the property, real and personal, of the decedent, so far as known to the plaintiff; and, if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the real property descended or devised to the heirs or devisees who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts.

§ 430 ^[401] **Reference to commissioner—notice to creditors.** In such actions, the court shall make an order for the creditors of the decedent to appear before a commissioner, to be appointed by the court, and

appointment of personal representative. *Maddox v. Williams*, 5 R. 696; Ky. Stat., sec. 3847.

(2) **Parties.** In action to settle an estate no persons except those mentioned in this section are necessary or proper parties. *Citizens Nat. Bank v. Boswell*, 93 Ky. 92. While all creditors are not necessary parties, they are entitled to be heard, and in some cases the general creditors are necessary parties, as where some of the creditors are claiming liens upon property that the testator has charged with the payment of his general debts. *Payne v. Johnson*, 95 Ky. 175.

(3) **Practice.** The statute which provides for the settlement and distribution of insolvent estates, by an action to be brought for that purpose by the administrator, contemplates the existence of personal estate and its due and proper administration, and has no application where the estate of the decedent does not pass into the hands of an administrator, and where no duties or liabilities can devolve upon him. *Thumb v. Gresham*, 2 Met. 306.

(4) **Right of creditors to contest claims.** In an action for the settlement of a decedent's estate, one of the principal

claims filed was that of a ward, based on a settlement made in the County Court. The other creditors of the decedent had the right to impeach and surcharge the settlement made in the County Court, and thereby reduce the claim of the ward against the estate. *Alsop v. Barbee*, 14 B. M. 522.

§ 429. (1) **Judgment to sell more land than necessary.** In an action to settle the estate of a decedent, a judgment ordering a sale of the whole tract, when it is only necessary to sell a portion of it to pay the debts, is void if there are infant defendants. Only a sufficiency of the land to pay the debts should be sold. *Gill v. Given*, 4 Met. 197. See *Thornton v. McGrath*, 1 Duv. 349; and sec. 493-3.

(2) **Sale of real estate** may be ordered before an order is made referring case to a commissioner for proof of claims and before there is any report of claims if court is satisfied that the personal estate is not sufficient to pay the debts. *Harlammert v. Moody*, 15 R. 839.

§ 430. (1) **Claims—when to be filed.** After an action to settle an estate is commenced, it is in the sound discretion of the chancellor to prescribe the time

prove their claims before a certain day to be named in the order, notice of which shall be given by advertisement in a newspaper; or, if none be published in the county, then by such other modes as the court may judge best calculated to give such creditors actual notice of the order; and, in addition to the advertisement in a newspaper, the court may direct publication in other modes.

§ 431. **Order of reference, in vacation—clerk may make.** The clerk of the court shall, during vacation, have the powers conferred on the court by section four hundred and thirty, except that the creditors shall be required to appear before the master commissioner in chancery for the county; and, if no newspaper be published in the county, the clerk shall cause the notice to be posted at the court-house door and at two or more other public places in the county.

§ 432 (400) **Creditor presenting claim becomes party.** A creditor appearing before the commissioner and presenting his claim becomes thereby a party to the action, and is concluded by the final judgment of the court allowing or rejecting his claim.

§ 433 (400) **Creditor failing to present claim—effect.** Creditors failing to appear and prove their claims, agreeably to such order, shall have no

within which creditors may present their claims. *Gray v. Lewis*, 79 Ky. 453.

(2) **Duty of creditor to file claim.** When a creditor is made defendant to a suit to settle an estate, and served with process, he should be compelled to either set up or abandon his claim; and, if he fails to present it, its recovery against the administrator, legatees and distributees is barred. *Hood v. Hood*, 80 Ky. 39.

(3) **Order of reference.** As the Code imperatively requires an order of reference to be made in all cases for the settlement of estates of deceased persons, such orders are ministerial, and not judicial, acts. *Smith v. Cochran*, 7 Bush 548.

(4) **Limitation.** Filing claim with the administrator of the principal, in a suit to settle his estate, did not prevent the statute of limitation from running as to the surety, although the claim was filed by request of the surety. *Harris v. Moberly*, 5 Bush 556.

(5) **Practice regarding presenting of claims.** The usual practice in actions for the settlement of the estates of deceased persons is for creditors to present their claims, verified and proved as required by statute. Upon exceptions to the master's

report, the sufficiency of the verification and proof can always be inquired into; and, in such cases, it seems allowable to investigate and pass upon the merits of the claim. But a creditor has a right to file his petition setting up his claim, and, when it is controverted, he has the right to demand that the grounds of defense be stated, according to the rules of pleading, in the form of a verified answer, or by exception containing the denials or allegations necessary to present a defense. *Horner v. Harris*, 10 Bush 357. See *Francis v. Smith*, 1 Duv. 121.

§ 432. (1) **Creditor presenting claim before commissioner becomes a party to the action and is concluded by final judgment.** *Heidrich v. Silva*, 89 Ky. 422.

(2) **Practice in presenting claims.** See note 5, sec. 430.

§ 433. **Failure to present claim.** An infant creditor being made a party to a suit for the settlement of an estate, and having failed to present his claim, has no claim against the administrator after he has paid out the entire estate. The judgment of distribution is binding on the infant as long as it is in force. *Stull*

claim against the executor or administrator who has actually paid out the estate in expenses of administration, and to creditors, legatees or distributees.

§ 434 [470] **Legatees and distributees liable to creditor.** Legatees and distributees shall be liable to a direct action by a creditor to the extent of estate received by each of them, notwithstanding the failure of the creditor to appear and the discharge of the personal representative as prescribed in the preceding section; and that liability shall continue during the same period that the liability of the personal representative would have continued but for said discharge.

§ 435 [471] **Refunding bond required of distributees and legatees.** [The court may, in its discretion, without motion, and shall, on motion of any party in interest, require the distributee or legatee, before receiving his distributable share of legacy, if received within five years after the grant of administration, to execute bond, with good surety to the Commonwealth, conditioned to pay his proportion, not exceeding the amount received by him, of any debt which may appear against the estate of the decedent within said period.] (*Sec. as amended by act 1880. Form of bond, page 626, and see bond in Ky. Stat., sec. 3843.*)

§ 436 [472] **Creditors may be enjoined from suing.** Upon the institution of the action mentioned in this chapter, an order may be made

v. Davidson, 12 Bush 167; and see note 2 to sec. 430.

§ 434. (1) **Action by infant ward against creditors.** An infant ward failed to present her claim in the settlement and distribution of the estate of her guardian, under the act of 1856. After arriving at age, she could sue the creditors who had received the estate, and require them to contribute *pro rata* to the payment of her claim. Roberts v. Phillips, 11 Bush 11.

(2) **Creditor to present claim—bar.** When devisees, as well as creditors, are made parties, and one of the creditors holds a claim which, if allowed, would alter the division of the estate, such creditor should be required to present his claim, or have it barred against legatees and distributees, as well as the administrator. Hood v. Hood, 80 Ky. 39.

(3) **Legatee or distributee**, who has received assets to the extent of the creditor's claim, may be sued for the whole amount of claim and required to look to his co-distributees for contribution. Ru-

bell v. Bushnell, 91 Ky. 251; and see Ky. Stat., sec. 2084, for further provisions concerning liability of heirs.

(4) It is error in action against heirs to render a joint judgment against them. The amount each is liable for should be ascertained and judgment rendered therefor. Ransdell v. Threlkeld, 4 Bush 347.

§ 435. (1) **Refunding bond.** It was held under the Code of 1854, sec. 471, to be error to render judgment even by default in favor of heirs or distributees against an administrator, without requiring a refunding bond. Mountjoy v. Pearce, 4 Met. 98; but observe amendment and see Fleming v. Jones, 12 Bush 503; and Ky. Stat., sec. 3843.

(2) Refunding bond can not be required of devisees by an executor after suits against him have been barred by lapse of time. Grigsby v. Wilkinson, 9 Bush 91.

§ 436. (1) **Injunction does not stop limitation.** Where suit is instituted to settle a decedent's estate, and the creditors

enjoining the prosecution of actions against the representatives of a decedent, by creditors, for their demands. But such enjoining shall not be made, unless the action for the settlement of the estate be commenced within three years after the qualification of the personal representative.

§ 437 [478] **Affidavit and demand necessary—exception.** The provisions of sections thirty-five to thirty-nine, inclusive, article two, chapter thirty-nine, General Statutes [now sections 3870 to 3874, both inclusive, of article one, chapter ninety-eight, of the Kentucky Statutes] concerning decedent's estates, are adopted as part of this Code, except that the

are enjoined as provided in this section, the injunction does not stop the statute of limitation from running against the creditors, as it does not stay proceedings on claims, but only prescribes that they shall be prosecuted in that action. *Biggs v. L. & B. R. Co.*, 79 Ky. 470; *Barnes v. Green*, 3 R. 253.

(2) Injunction granted under this section did not prevent a ward from bringing an action against estate of county judge to recover damages for failure to take a sufficient bond from guardian. *Com. v. Netherland*, 87 Ky. 195.

§ 437. (1) **Affidavit—sufficiency of.** It is necessary that the affidavit of the claimant should state that there is no "offset or discount" against the claim. "Offset" alone is not sufficient. If the debt is an account it must be proved by the affidavit of a competent witness, stating that he knows it to be just and correct. *Trabue v. Harris*, 1 Met. 597; and see Ky. Stat., sec. 3870.

(2) The affidavit must state that there is *no offset or discount*; that there is *no just offset or discount* will not do. Every fact touching the validity of the claim which, in a suit thereon, it would be necessary to aver in the petition, should be proved by the evidence, tendered to the personal representative. *Leach v. Kendall*, 13 Bush 424; *Prewitt v. Wortham*, 79 Ky. 287; see *Greer v. Powell*, 1 Bush 489; if the debt be evidenced by note or other writing, the presentation of the note, accompanied with the affidavit of the claimant, is all that is necessary; but if the claim is an account, it must be proved by the claimant and another person, unless it can not be proved by any per-

son except the personal representative; and if he refuses to give an affidavit, the affidavit of the claimant alone will be sufficient. *Trabue v. Harris*, 1 Met. 597. See Ky. Stat., sec. 3870, and note requirement as to verification of accounts.

(3) Witness in verifying claim must speak of his own personal knowledge, and when he states facts unqualifiedly it will be presumed that he does so. *Sherley v. Sherley*, 13 R. 565.

(4) **Agent may make affidavit—waiver.** The affidavit may be made by an agent if the creditor is absent from the State; and the demand may be waived by the administrator before or after suit. See this case for a statement of facts evidencing a waiver. *Howard v. Leavell*, 10 Bush 481.

(5) **Claimant should file copies of records** with his claim, when they are necessary to support it. *Sherley v. Sherley*, 13 R. 565.

(6) **Commonwealth.** The statute requiring the verification of claims does not apply to the Commonwealth, and claims due to the State need not be verified or payment demanded. *Arnold v. Com.*, 80 Ky. 135.

(7) **Credit by claims not verified** may be allowed an administrator in an action against him for the settlement of the estate, provided it appears that the claims are just. *Terrell v. Rowland*, 86 Ky. 67.

(8) **Demand when not necessary.** Plaintiff's petition charged that defendant's testator had, as agent, sold lands for the benefit of plaintiff, for which he never accounted, and that he had no knowledge of the fiducial transactions of the agent; that the defendant, as executor,

demand therein mentioned need not be made, if the personal representative of the decedent be a non-resident of this State or shall have been absent therefrom four months. (*These sections of statute require creditor to make affidavit and demand payment. Form of affidavit, pages 628, 629.*)

held the only evidences thereof, and refused to make a settlement or permit them to be seen, and prayed for a discovery and settlement. Held that the affidavit and demand, before filing the petition, were not required by the statute, but after discovery, and before a coercive settlement, the affidavit should be made. *Fox v. Apperson*, 6 Bush 653.

(9) Demand is not necessary when suit is commenced before the death of the debtor, but no judgment can be rendered until the affidavit required by the statute is made. *Buford v. Guthrie*, 14 Bush 677; *Worthly v. Hammond*, 13 Bush 511. And "if the personal representative has not assets in his hands with which to pay debts against the estate, there is no necessity for creditors to present their demands to him for payment." *Grey v. Lewis*, 79 Ky. 453.

(10) A surety who pays the debt of his principal after the death of the latter is not required to make demand of his administrator before suit brought to recover what he paid as surety. *Lucking v. Gegg*, 12 Bush 298.

(11) A debt created by the personal representative is not required to be verified by the affidavit of the claimant. *Berry v. Graddy*, 1 Met. 553.

(12) Demand is only necessary when the suit is against the personal representative, but before judgment is rendered on a claim against the estate of a decedent in an action where there is no personal representative, the affidavit should be made. *Perry v. Seitz*, 2 Duv. 122. See *Johnson v. Belt*, 4 Bush 405; *Cockrill v. Mize*, 11 R. 637.

(13) In a petition against an administrator it is not necessary to allege that demand was made of him before suit brought. If demand, accompanied by the proper affidavit, was not made, the administrator can proceed by rule to

have the action dismissed without prejudice. *Rogers v. Mitchell*, 1 Met. 22.

(14) Demand is not necessary when an action to settle estate is pending and a reference has been made to the master to audit and report claims. *Orr v. Orr*, 10 R. 755; *Gay v. City of Lou.*, 93 Ky. 349.

(15) Demand must be made before suit is brought, and the failure to make it can not be cured by a subsequent compliance, set up in an amended petition. *Rogers v. Mitchell*, 1 Met. 22. See Ky. Stat., sec. 3870.

(16) Interest on claims. Although a claim has not been verified and payment demanded within one year after the appointment of the personal representative, interest may be allowed if the personal representative has waived demand, and no person will be affected by allowing interest except himself. *Croninger v. Marthen*, 83 Ky. 662; but as a rule it is a condition precedent to the recovery of interest on a claim that demand be made within the year, and this rule is not waived by partial payments made on a claim not so presented. *Jett v. Cockrill*, 85 Ky. 348.

(17) Judgment—verification of. In a proceeding to revive a judgment, the judgment should be verified by affidavit, and demand made. *Curry v. Bryant*, 7 Bush 301. And when the defendant dies pending the action the claim should be verified. *Mathews v. Jones*, 2 Met. 254.

(18) Objection to be made by rule. If affidavit and demand have not been made, the proper time to make the objection by rule is before answer is filed. *Thomas v. Thomas*, 15 B. M. 178. But in *Nuttall v. Brannin*, 5 Bush 11, it is held that a rule can be obtained against the plaintiff after answer is filed to show cause why petition should not be dismissed for want of verification and demand; but it is too late to make objection after judgment. *Cockrill v. Mize*, 11 R. 637.

§ 438. **Provisions of this chapter applicable to trust estates.** The foregoing provisions of this chapter shall, so far as applicable, regulate proceedings for the sale of property held in trust, by virtue of the provisions of article two, chapter forty-four, General Statutes [now article two, of chapter fifty-four, of the Kentucky Statutes] or assigned by a debtor for the payment of debts generally; but subsection two of section four hundred and twenty-eight shall not be so construed as to require all creditors holding liens upon the property by virtue of the statute, or under the deed of assignment, to be made parties.

CHAPTER IV.

ENFORCING THE SATISFACTION OF JUDGMENTS.

§ 439. **Proceedings to enforce—when allowed—parties.**

§ 440. **Answers to be verified—court may require full disclosure.**

§ 441. **Attachment without affidavit or bond.**

§ 442. **Lien on property of defendant—how created.**

§ 443. **Surrender of property compelled by court.**

§ 439 (474) **Proceedings to enforce when allowed—parties.** After an execution of *fiery facias*, directed to the county in which the judgment was

(19) **Set-off—counter-claim.** A claim against a decedent's estate, presented in a set-off or counter-claim, must be verified and proved in the manner required by law in the case of claims sued upon by original action, but demand is not necessary. An affidavit in the body of the pleading is not sufficient. It should be verified by separate affidavit, filed with the pleading. *Warfield v. Gardner*, 79 Ky. 583.

(20) **Taxes,** claim for, must be verified and payment demanded. *Gay v. City of Lou.*, 93 Ky. 349.

(21) **Waiver of objection.** It is too late after judgment to object to claim for want of verification. *Gray v. Marshall*, 12 R. 103; *Cockrill v. Mize*, 11 R. 637.

§ 438. (1) **Parties to action.** In an action to settle a trust estate, all persons having an interest in the property, or any part thereof, conveyed by the deed, and the creditors of the assignor, so far as known, except creditors holding liens upon the property, should be made parties to the

action, either as plaintiffs or defendants. *Dobyns v. Dobyns*, 79 Ky. 95.

(2) **Suit by one creditor inures to the benefit of all.** A suit by one creditor under the act of 1856, if commenced in time and prosecuted to a successful termination, inures to the benefit of all the creditors, whether they sue or not. *Roberts v. Phillips*, 11 Bush 11; 89 Ky. 422; and a creditor who has filed his action in time can not dismiss it, nor can it be fled away by the court so as to defeat the claims of other creditors who had filed their claims and made themselves parties to the action. *Sawyers v. Langford*, 5 Bush 539; nor can a creditor by refusing to appeal from judgment dismissing his claim deprive other creditors of the right to prosecute an appeal. *Heidrich v. Silva*, 89 Ky. 422; and see *Linthicum v. Fenley*, 11 Bush 131.

(3) **Verification of claims** is now required by Ky. Stat., secs. 90, 1917.

§ 439. (1) **Action in circuit court on judgment of inferior court.** The circuit court

rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, per-

has jurisdiction of an action to subject an equitable interest in real property to the satisfaction of a judgment rendered in the quarterly court, upon which an execution had been returned, no property found, both from the quarterly and circuit court. *Jones v. Jeffress*, 11 Bush 636; but return from both courts is necessary. *Clements v. Waters*, 90 Ky. 96; *Behan v. Warfield*, 90 Ky. 151. And see *Burnes v. Cade*, 10 Bush 251.

(2) Action may be brought in circuit court to subject personalty, upon a return of no property in a justice's court. *Austin v. Payne*, 7 Bush 480; but not land that can be levied on under an execution. 90 Ky. 96; *Mansfield v. Wilkinson*, 16 R. 276; *Weatherford v. Myers*, 2 Duv. 91.

(3) **Bastardy case—to enforce judgment in.** In a bastardy proceeding, judgment was rendered in the county court against the father. On a return of no property on this judgment, the circuit court had jurisdiction to set aside a fraudulent conveyance made by the father, and subject the property. *Brightwell v. Com.*, 79 Ky. 537.

(4) **Conclusiveness of judgment.** Until reversed or vacated as provided by law, or attacked for fraud, judgment upon which action on return of no property is based is conclusive, and defendant can not show he was not before court in contradiction of the record. *Stevenson v. Flournoy*, 89 Ky. 561; but see as to rights of trustee and heirs to contest judgment against *cestui que trust* or personal representative. *Roberts v. Yancey*, 94 Ky. 243; *Willis v. Roberts*, 90 Ky. 122; 78 Ky. 413; 89 Ky. 561.

(5) **Creditor may maintain action** upon return of no property, and in such action acquire a lien upon and subject property that was and is subject to execution. He has a right to rely upon officer's return

although it be false. *Clements v. Waters*, 90 Ky. 96.

(6) **Execution must be directed** to and executed by an officer authorized to execute it, or the return will not authorize proceedings under this chapter. *Johnson v. Elkin*, 90 Ky. 163; see notes to sec. 667 as to what officers must execute executions.

(7) **Garnishees.** As to proceedings against, see notes to secs. 223, 225.

(8) **Interest on costs** of former action should not be allowed. *Cockrill v. Mize*, 11 R. 637.

(9) **Judgment—action on.** The only action that can be maintained on a judgment of a court of this State is the equitable action to enforce its satisfaction, provided in this section. *Davidson v. Simmons*, 11 Bush 330.

(10) **Judgment superseded.** After a judgment has been superseded and the bond executed, no action can be brought to enforce its collection. *Johnson v. Williams*, 82 Ky. 45.

(11) **Officer's return on execution.** A return by a deputy sheriff of "no property found," without adding "in my bailiwick," is sufficient. *Evans v. Wait*, 5 J. M. 110.

(12) A return of "no property found," made two days after the issual of the execution, was held sufficient. *Dana v. Banks*, 6 J. J. M. 219.

(13) **Petition — necessary allegations in.** The petition must allege that the execution was directed to the county of defendant's residence, or to the county where the judgment was rendered, and that it was returned no property found by the proper officer. An allegation that plaintiff "had an execution issued, and returned no property found, by the sheriff," is insufficient. *Maddox v. Fox*, 8 Bush 402; *Tanner v. Howard*, 1 R. 343.

sons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants. (*Venue of action, sec. 70.*)

§ 440 [475] **Answers to be verified — court may require full disclosure.** The answer of each defendant shall be verified by his oath, and not by that of an agent or attorney, and the court shall, if necessary, enforce full and explicit discoveries in such answers by process of contempt.

§ 441 [476] **Attachment without affidavit or bond.** In such action the plaintiff may have an attachment against the property of the defendant in the execution, similar to the general attachments provided for in chapter three, of title eight, without either the affidavit or bond therein required.

§ 442 [477] **Lien on property of defendant—how created.** A lien shall be created on the property of the defendant by the levy of the attachment; or by service of the summons, with the object of the action indorsed thereon, on the person holding or controlling his property. (*Except against defendant constructively summoned, sec. 418; form of indorsement, page 634.*)

(14) "The failure to aver in terms that judgment was still unsatisfied, if a material defect, was cured by an amendment alleging that fact, and did not vitiate the levy or lien created by the attachment." *Lewis v. Quinker*, 2 Met. 284.

(15) In an action upon a return of "no property found" on an execution against an administrator to subject property voluntarily conveyed by the decedent after the creation of plaintiff's demand, it is necessary to allege in the petition against the fraudulent vendees the facts constituting the original cause of action. In such case, the defendants may controvert the justness of the demand, notwithstanding the judgment against the administrator. *Alexander v. Quigley*, 2 Duv. 399, and see note 4.

(16) **Property fraudulently conveyed.** Either an attachment or a return of no property must be obtained before a court of equity will entertain a petition to set aside a voluntary or fraudulent conveyance in order to satisfy a legal demand. *Martz v. Pfeifer*, 80 Ky. 600. As to the right to subject property purchased by a debtor and conveyed to his wife and children, see *Hanby v. Logan*, 1 Duv. 242.

(17) **Second personal judgment in action** on return of no property is erroneous. *Smith v. Belmont*, 11 Bush 390; *Farmer v. Porch*, 5 R. 933.

(18) **Waiver of error.** It is too late after an issue and trial on the merits in lower court to raise question that there was no return of "no property." *Behan v. Warfield*, 90 Ky. 151.

§ 441. **Neither affidavit nor bond necessary to obtain an attachment in an action upon a return of no property.** *Lewis v. Quinker*, 2 Met. 284.

§ 442. (1) **Attachment—when not necessary to create lien.** An attachment is not necessary to create a lien if the property sought to be subjected be specifically described in the petition. "A lien is created on such property when the petition is filed." *Trabue v. Conners*, 84 Ky. 283; *Parsons v. Meyburg*, 1 Duv. 206; *Ward v. Robinson*, 1 Bush 294; *Murphy v. Cochran*, 80 Ky. 239.

(2) Money belonging to a railroad corporation can not be attached by the service of a summons, with the object of the action indorsed thereon, upon the president of the company. Service upon him was but service on the company. There is no section of the Code which

§ 443 ⁽⁴⁷⁸⁾ **Surrender of property compelled by court.** The court shall enforce the surrender of the money or securities therefor, or of any other property of the defendant in the execution, which may be discovered in the action; and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender, until it shall be done or until the court be satisfied that it is out of his power to do so.

CHAPTER V.

SUMMARY PROCEEDINGS.

§ 444. Judgment obtained on motion—when.

§ 445. Notice of motion.

§ 446. Notice—requisites of.

§ 447. Motion deemed abandoned—when.

§ 448. Motion may be made any day of term.

§ 449. Written pleadings not required—judgment.

§ 444 ⁽⁴⁷⁸⁾ **Judgment obtained on motion—when.** A judgment may be obtained, on motion, by a surety against his principal or co-surety for money paid; by a client against his attorney for money collected or property received; by a party or officer against a surety for costs;

provides that an attachment lien can be created upon intangible property by the service of any character of process upon the judgment defendant alone. *N. & C. Bridge Co. v. Douglass*, 12 Bush 673; see now Ky. Stat., sec. 814, as to enforcement of judgments against railroad company.

(3) When the action is for the discovery of and subjection of any property owned by the defendant, no lien is created on his property unless an attachment is obtained, or summons with indorsement executed on person holding his property. *Ward v. Robinson*, 1 Bush 294; *Lewis v. Quinker*, 2 Met. 284.

(4) **Property exempt—levy—lien.** As to property exempt from attachment, see note 2, sec. 199; as to sufficiency of levy, see notes to sec. 203; as to lien created by attachment, see notes to sec. 212.

(5) **Railroad company—enforcement of judgment against.** Ky. Stat., sec. 814.

(6) **Service of summons—lien.** By the service of a summons, with the object of the action indorsed on it, upon the person

holding or controlling the defendant's property, the plaintiff acquires a lien on all the defendant's property in his possession. *Hufman v. Thomas*, 2 Duv. 105; but see sec. 418, providing that a lien can not be created on property of defendant constructively summoned by indorsement on summons.

(7) Indorsement upon summons or levy of attachment is not necessary when the land sought to be subjected is described in the petition. *Bryant v. Bryant*, 14 R. 358.

§ 444. (1) **Summary proceedings.** The collection of appeal bond can not be enforced under the provisions of this chapter. *Stephens v. Miller*, 80 Ky. 47.

(2) A surety in the bond executed by the defendant to retain possession of property, as provided in sec. 188, can not be proceeded against by motion. *Gay v. Morgan*, 4 Bush 606.

(3) A trustee appointed by the court to invest funds, and his sureties in his bond as such trustee, in case of his failure to invest the funds as required by

and by a party against an officer for money collected or property received, and for the damages which such party is entitled to recover; and in all other cases specially authorized by statute; and the service of the notice shall be regarded as the commencement of the proceeding.

§ 445 [440] **Notice of motion.** Notice of such motion shall be served on the party against whom the judgment is sought, at least ten days before the motion is made. (*By whom, and how, served, secs. 624 to 630.*)

§ 446 [441] **Notice—requisites of.** The notice shall state the nature and grounds of the motion, and the day on which it will be made.

§ 447 [442] **Motion deemed abandoned—when.** Unless the motion be made or entered on the motion docket on the day specified in the notice, it shall be considered as abandoned.

§ 448 [443] **Motion may be made any day of term.** Such motion mentioned in this chapter may be made on any day of the term of the court.

§ 449 [444] **Written pleadings not required—judgment.** The motion may be heard and determined upon or without written pleadings, and judgment shall be given according to law and the rules of equity.

the court, may be proceeded against by rule, and required to pay such funds back into court. Such proceedings by rule may be instituted by the court on its own motion. *Dickinson v. Trout*, 8 Bush 441.

(4) A purchaser of land sold under the judgment of a court may recover rent accruing after the confirmation of his purchase by motion against the tenant, upon notice duly executed. *Cooper v. Baker*, 2 Bush 244.

(5) The provisions of this chapter have not repealed the right of a surety who has paid a judgment to have it transferred to him as provided in the Gen. Stat., chap. 104, sec. 9 [Ky. Stat., sec. 4666]. *Alexander v. Lewis*, 1 Met. 407.

(6) The collection of costs which a party binds himself to pay by a recognizance entered upon the record may be enforced by summary proceedings. *Kinney v. O'Bannon*, 6 Bush 692.

§ 446. (1) **Notice—sufficiency of.** In determining the sufficiency of a notice on motion for judgment on a bond executed under section 645 of the Code, it should be considered in connection with the bond. *Smith v. Wells*, 4 Bush 92; and see further, as to sufficiency of notice,

Bunnell v. Thompson, 12 Bush 116; *Moar v. Cov. City Nat. Bk.*, 80 Ky. 305.

(2) When a party appears to a notice defective in form, and without objection makes defense to the merits, he waives the right to object to it because not sufficient. *Brown v. Gibson*, 78 Ky. 602.

§ 447. (1) **Motion to be entered on day specified.** The motion must be made or entered on the day specified in the notice, and if this is not done a judgment rendered pursuant to the notice will be a nullity. Notice was given a sheriff and his sureties that on fourth day of the June term a motion would be made for judgment. On the third day of the term the notice was filed and ordered to lie over; no further step was taken at that term. A judgment rendered the next term by default was a nullity. *Foster v. Wade*, 4 Met. 253; see *Mer-shorn v. Com.*, 2 Met. 371.

(2) Motion may either be made in open court on day specified in notice, or on that day may be entered on the motion docket. *Bent v. Maupin*, 86 Ky. 271.

§ 449. **Pleadings.** Under the old Code in a proceeding by motion on a claimant's bond, written pleadings were not allowed. *Watson v. Gabby*, 18 B. M.

CHAPTER VI.

CIVIL PROCEEDINGS ON BEHALF OF THE COMMONWEALTH.

§ 450. Sections of Statutes adopted.

§ 450 (400 to 400) **Sections of Statutes adopted.** The provisions of chapter ninety-two, article eleven, General Statutes [now chapter one hundred and eight, article eight, of the Kentucky Statutes], are adopted as part of this Code. (*This article of Statutes provides how money due the State by sheriff or other officers may be collected.*)

CHAPTER VII.

ARBITRATIONS AND AWARDS.

[SEE STATUTORY PROVISIONS, KY. STAT., SEC. 69.]

- § 451. 1. Controversies that may be submitted and how.
 2. Oath of arbitrators and umpire.
 3. Witnesses—how attendance of coerced.
 4. Fiduciaries may submit controversy.
 5. Arbitrator refusing to act—proceedings.
 6. Meetings—powers—award.
 7. Award entered as judgment—when.
 8. Power of court over award.
 9. Arbitration of little controversies—practice—appeal.

§ 451 (400) **Controversies that may be submitted and how.** 1. Any controversy which is or might be the subject of an action may, at the request of those interested therein, be submitted to the decision of

658. But under this Code such a motion may be heard and determined upon or without written pleadings. *Couchman v. Maupin*, 78 Ky. 33.

(2) If parties see proper to proceed by pleadings the rules applicable to pleadings in action obtain. *Sargent v. Farrar*, 2 R. 212.

(3) **Practice.** A party can not be deprived of the right to a jury trial by proceeding by motion if he is entitled to have question tried by a jury. See *Con.*, sec. 7; *Ky. Stat.*, page 89, and notes thereto.

§ 451. (1) **Amendment of award** can not be made after award is reduced to writ-
 (16)

ing as specified in submission, and where such an attempt is made the second award will be disregarded and the original enforced. *Martin v. White*, 1 R. 347; *Eddy v. Northup*, 15 R. 434; 1 Met. 434.

(2) **Appeal does not lie** from an award under a statutory submission, although by entry of record it is made the judgment of the court, unless some exception is taken affecting the validity of the award. *Payne v. Payne*, 8 R. 591.

(3) **Common law submission**—parties may stipulate as they please as to notice or other conditions. *Martin v. White*, 1 R. 347.

(4) **Duty of arbitrators and parties.** The

one or more arbitrators, or to two and their umpire, by the order of any court having jurisdiction of the subject. The parties making such submission shall, if there be no action pending, by written agreement filed and noted on the record, or by an entry on the record, state what question is submitted. The order of court shall state the time in which the award is to be made and returned, but the court may enlarge the time.

2. Oath of arbitrators and umpire. Arbitrators and the umpire, if there be one, before they proceed to act shall take an oath to decide the controversy to them submitted according to law and evidence and the equity of the case, to the best of their judgment, without favor or affection; and a certificate of such oath shall be returned to the court with the award.

3. Witnesses—how attendance of coerced. Any one of the arbitrators shall have power to issue subpoenas for witnesses to attend their sittings and give evidence touching the questions referred to them, to which all sheriffs and other like officers shall give obedience. Witnesses failing to attend before arbitrators at the time and place designated, or who shall refuse to give evidence when they do attend, shall be reported to the court by the arbitrators, and be proceeded against and punished as if the case had been pending in court.

arbitrators are to act upon the evidence before them, and it is the duty of each party to bring before them all of his evidence. *Adams v. Ringo*, 79 Ky. 211.

(5) When reference is made to several they should hear together the evidence, and consult jointly about it and their award, and all should sign the award in the presence of each other. *Henderson v. Buckley*, 14 B. M. 292.

(6) Where an action for the settlement of a partnership is referred to arbitrators, whatever claim either asserts against the other as growing out of the partnership, although not mentioned in the pleadings, is a matter in controversy and embraced in the submission. *Adams v. Ringo*, 79 Ky. 211; and see *Newton v. West*, 3 Met. 24.

(7) **Exceeding authority.** If the arbitrators exceed their authority and act upon matters not submitted, that part of their award will be stricken out and the residue upheld. 79 Ky. 211; and see *Carson*

v. Carson, 1 Met. 434; *Eddy v. Northup*, 15 R. 434.

(8) **Form—mistakes.** Mere mistake of law made by arbitrators is not sufficient to set aside an award. This mode of settling controversies is to be encouraged, and mere formal objections will be disregarded when they do not affect the substantial rights of the parties. *Adams v. Ringo*, 79 Ky. 211; *Snyder v. Rouse*, 1 Met. 625; *Rudd v. Jones*, 4 Dana 229; *Overly v. Overly*, 1 Met. 117; *Whittaker v. Wallace*, 1 R. 271; *Cook v. McRoberts*, 5 R. 764.

(9) **Fraud—to set aside award for.** In an action to set aside an award upon the ground of fraud, there must be averments of the specific fraud relied on. *Phillips v. Phillips*, 81 Ky. 147.

(10) **Judgment on award.** It is error to render judgment upon an award not delivered to the parties ten days before the commencement of the term at which judgment is rendered. But this is a clerical misprision, and motion must be

4. **Fiduciaries may submit controversy.** The personal representative of a decedent, the guardian, committee or curator of a person under disability, or any trustee, may agree to such submission. Upon such submission, made in good faith, the award shall be binding, and be entered as the judgment of the court. No such fiduciary shall be responsible for any loss resulting from an award adverse to the interest he represents, unless caused by his fault or neglect.

5. **Arbitrator refusing to act—proceedings.** If any arbitrator fail or refuse to act, the court may appoint another, or set aside the order of reference.

6. **Meetings—powers—award.** The arbitrators and umpire, if there be one, shall meet at such convenient times and places as may be necessary, of which the parties shall have reasonable notice, and hear such evidence as either party may adduce. They shall have power to administer oaths. They shall make their award in writing, stating therein when it is made, and sign it; and shall deliver a copy of it to each of the contending parties, and return the original to the court with indorsements showing the time of delivering a copy to each party.

made to correct it in the Circuit Court. *Carson v. Carson*, 1 Met. 434.

(11) **Majority of persons** to whom a question is submitted may act. *Hewitt v. Craig*, 86 Ky. 23.

(12) **Notice—waiver of.** Upon an arbitration made under common law rules, either party may waive notice of the meeting of the arbitrators or decline to be present. When the award is made the arbitrators have no power over it, and a promise by them to reopen the arbitration and hear additional testimony will not affect the award. *Whitlock v. Ledford*, 82 Ky. 390.

(13) When the parties are present and heard by the arbitrators it is no objection to the award that it does not state that the parties had notice of the time and place the arbitrators met and acted. *Newton v. West*, 3 Met. 24.

(14) **Oath of arbitrators.** The officer's certificate accompanying the award stated that the arbitrators appeared "and made oath according to law that they would faithfully discharge the duties devolved upon them as arbitrators

and umpire." Held sufficient. *Snyder v. Rouse*, 1 Met. 625.

(15) In the absence of proof to the contrary it will be presumed that the arbitrators were sworn, and that they complied with all the requirements of the law. *Carson v. Carson*, 1 Met. 434.

(16) **Parol submission.** The rule of the common law that any matter in controversy might be submitted by parol agreement to arbitration unless it divested the parties of some right that could only pass by a written agreement, has not been changed by the Code or Statutes. *Thomasson v. Risk*, 11 Bush 619; *Royse v. McCall*, 5 Bush 695.

(17) **Statutory arbitration and award.** See Ky. Stat., sec. 69.

(18) **Submission by order of court.** To authorize the reference of a controversy to arbitration by rule of court, when there is no action pending, it is necessary that there be an agreement in writing filed and noted of record, or an entry on the record stating the matter submitted. A judgment upon an award without these

7. **Award entered as judgment—when.** The award shall be entered as the judgment of the court at the first term, ten days before which copies of the award are delivered to the parties, unless, on exceptions filed, it be set aside by the court.

8. **Power of court over award.** No award shall be set aside for the want of form. But courts shall have power over awards on equitable principles as heretofore.

9. **Arbitration of little controversies—practice—appeal.** Controversies within the jurisdiction of a justice of the peace may be submitted for arbitration in the same manner, and the proceedings shall be the same as are above authorized and required. Either party may appeal to the circuit court from the judgment of the justice on the award, as in other cases. (*Controversy may without suit be submitted to court, sec. 637.*)

CHAPTER VIII.

FORCIBLE ENTRY AND DETAINER.

- § 452. Forcible entry and detainer defined.
- § 453. Immaterial when tenancy created.
- § 454. Warrant—form of and who may issue—jury not necessary.
- § 455. Warrant, how executed.
- § 456. Return of warrant—panel of jurors—oath to jury.
- § 457. Duty and powers of justice at trial.
- § 458. Subpoenas for witnesses—attendance coerced.

prerequisites is unauthorized. *Carson v. Carson*, 1 Met. 434.

(19) **Time in which award to be made.** When a time is fixed within which the award is to be returned, it must be made within the time; and the arbitrators should decide all questions submitted; for a failure to comply with either of these requirements, the award will be set aside. *Burnam v. Burnam*, 6 Bush 389.

(20) **Umpire—selection and duties.** Umpire may be selected at any time after arbitrators are chosen. *Whittaker v. Wallace*, 1 R. 271; and see as to duties of umpire and part he should take in deliberations, *Couchman v. Maupin*, 78 Ky. 33; 1 R. 271.

(21) The umpire should only act when the arbitrators differ, but the fact that he occasionally takes part in the discus-

sion of questions will not invalidate the award. 79 Ky. 211; *Whittaker v. Wallace*, 1 R. 271.

(22) On a submission to two arbitrators, who in case of disagreement are to choose an umpire, the umpire is only authorized to act when they disagree; and if they all act together the award will be set aside. *Royse v. McCall*, 5 Bush 695.

(23) **Who may submit to arbitration.** A county court may submit to arbitration matters in controversy between it and an individual. *Remington v. Harrison County*, 12 Bush 148.

(24) A personal representative may submit matters to arbitration with the same effect and the same freedom from liability out of court, as with the consent of court. *Overly v. Overly*, 1 Met. 117.

- § 459. Verdict—proceedings if jury disagree.
- § 460. Judgment on inquest—form of.
- § 461. Proceedings if inquest not traversed—warrant of restitution.
- § 462. Justice to preserve papers—fee for transcript.
- § 463. Traverse—time to file—bond to be executed.
- § 464. Damages recoverable on traverse bond.
- § 465. Proceeding on traverse in circuit court.
- § 466. Proceedings in circuit court after judgment.
- § 467. Waste may be restrained pending trial.
- § 468. Proceedings no bar to action for trespass, waste or rent.
- § 469. Limitation two years.

§ 452 [100] *First: Forcible entry and detainer defined.* The words “possession,” “entry,” “detainer,” in this chapter, refer to lands and tenaments.

Second: A forcible entry is—

1. An entry without the consent of the person having the actual possession.
2. As to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent.

§ 452. (1) *Acquittal no bar to another writ.* An acquittal on a charge of forcible detainer will not bar a writ for a forcible detainer committed at a subsequent time. *Shepherd v. Thompson*, 2 Bush 176; nor is writ dismissed because defective bar to another writ. *Hamel v. Lawrence*, 1 Mar. 330.

(2) *Deeds.* Deeds may be introduced to show the extent of possession, but not the right of possession. *Beauchamp v. Morris*, 4 Bibb 312; *Carpenter v. Shepherd*, 4 Bibb 501; *Taylor v. White*, 1 Mon. 37.

(3) *Detainer defined—who may prosecute writ of.* Before a writ of forcible detainer can be maintained against a tenant, it is necessary that he should have refused to restore the possession after the expiration of his term; and a mere continuance in possession, without such refusal, or the commission of some act constructively constituting a refusal, is not sufficient to convict a tenant of a forcible detainer. *Shepherd v. Thompson*, 2 Bush 176; *Thompson v. Marsh*, 4 Bush 423.

(4) A tenant's conduct may amount to a refusal, although no formal demand for possession has been made, and this fact should be left to the jury. *Beynroth v. Mandeville*, 5 Bush 584; and disclaimer

of tenancy subjects tenant to warrant for forcible detainer even before expiration of tenancy.

(5) Parties in possession of land sold under decree leased land from purchaser, and failing to surrender possession when lease expired, warrant of detainer was proper remedy. *Walker v. Bush*, 6 R. 514.

(6) A party in possession, under an agreement to occupy and take care of land for a term of years, with the understanding that he might secure the title by the purchase of it when he should become able, was not a tenant in the sense that he could be evicted by a writ of forcible detainer. *Reeder v. Bell*, 7 Bush 255.

(7) Where W sold land to G and executed to him a title bond, and G afterward sold the land to B and assigned to him the bond, with the agreement that G should retain possession of the land until the March following, B could not maintain a writ of forcible detainer against G. *Goldsberry v. Bishop*, 2 Duv. 143.

(8) To maintain the writ of forcible detainer, the relation of landlord and tenant must exist; and the reservation of rent in some form, and allegiance to

Third: A forcible detainer is—

1. The refusal of a tenant to give possession to his landlord after the expiration of his term; or of a tenant at will or by sufferance to give possession to the landlord after the determination of his will.

2. The refusal of a tenant of a person who has made a forcible entry to give possession, on demand, to the person upon whose possession the forcible entry was made.

3. The refusal of a person who has made a forcible entry upon the possession of one who acquired it by a forcible entry to give possession, on demand, to him upon whose possession the first forcible entry was made.

4. The refusal of a person who has made a forcible entry upon the possession of a tenant for a term to deliver possession to the landlord, upon demand, after the term expires; and, if the term expires whilst a writ of forcible entry sued out by the tenant is pending, the landlord may, at his cost and for his benefit, prosecute it in the name of the tenant.

the title, are the distinguishing characteristics of a contract by which the relation of landlord and tenant exists. 2 Duv. 143. See 1 Duv. 151; 8 Bush 238; and see further Ky. Stat., secs. 2298, 2295, 2296, 2326, 2327.

(9) Tenant can not dispute title of his landlord nor avail himself of title derived from another. *Clinton v. Clinton*, 2 Bibb 433.

(10) While B was occupying land as the tenant for years of A, C acquired the legal title to the land by the judgment of the circuit court, and was awarded a writ of possession. Without a formal eviction by the writ, B surrendered possession to C and took a lease from him; and, having refused to surrender possession when his time expired, C could maintain a writ of forcible detainer against him. *McMurty v. Adams*, 3 Bush 70.

(11) **Forcible entry.** A subtenant delivered the key of the house he had been occupying to the tenant, who had a lease of the property for five years, and abandoned the premises, but immediately thereafter he borrowed the key from the tenant and delivered it to the landlord, who took possession of the premises. The tenant could maintain a writ of

forcible entry against the landlord. *Haupt v. Pittaluga*, 6 Bush 493.

(12) The statute relating to forcible entry and detainer does not affect the common law right of entry, when exercised in a peaceable manner, except so far as the statute itself furnishes a remedy to regain possession. A person having the right to enter, who makes an entry in pursuance of that right, can only be removed by a writ of forcible entry. *Tucker v. Phillips*, 2 Met. 416.

(13) Residence upon part of a tract claiming the whole, though part is not inclosed, may give such possession of the whole tract as will authorize the person to maintain a writ of forcible entry for an intrusion upon any part of it. *Henry v. Clarke*, 4 Bibb 426; *Smith v. Morrow*, 5 Litt. 210.

(14) A person may have possession in fact of land without residing upon it, and though it be not cultivated, improved or inclosed. *Brumfield v. Reynolds*, 4 Bibb 388; *Wall v. Nelson*, 3 Litt. 395; *Chiles v. Stephens*, 3 Mar. 344; *Young v. Ringo*, 1 Litt. 226.

(15) An entry upon uninclosed land, with the intent to clear and fit it for cultivation without actually inclosing it, is a forcible entry. *Humphrey v. Jones*, 3

§ 453 (801) **Immaterial when tenancy created.** It is not material whether the tenant shall have received possession from his landlord, or have become his tenant after obtaining possession.

§ 454 (802) **Warrant—form of and who may issue—jury not necessary.** Upon complaint by a person aggrieved by a forcible entry or detainer to a justice of the peace or county judge of the county in which the land or tenement, or a principal part thereof, lies, he shall issue his warrant to the sheriff, or any constable, in substance as follows: "*The Commonwealth of Kentucky to the Sheriff [or any constable] of ——— county: Whereas, A B hath made complaint to me, J S, a justice of the peace [or county judge] for said county, that C D and E F did, on the ——— day of ———, forcibly enter into [or forcibly detain from the said A B] one house and field on the waters of ———, in the county aforesaid [or other general description of the lands or tenements], which were in the peaceable possession of A B [or which the said C D and E F, tenants of the said A B, now hold against him]: You are, therefore, commanded to summon a good and lawful jury of your county to meet on the premises, or at a place convenient thereto, on the ——— day of ———, to inquire into the*

Mon. 261. Entry within the lines and fencing of another without his consent constitutes a forcible entry. *Henry v. Clarke*, 4 Bibb 426.

(16) Entry with intent to cut timber, or occasional chopping or cutting and removing timber, is not such an entry as will authorize a writ of forcible entry. It is only a trespass. *Grugher v. Wheeler*, 12 B. M. 183; *Humphrey v. Jones*, 3 Mon. 261.

(17) Tenant in possession is proper person to maintain writ of forcible entry and not the landlord. *Pogue v. McKee*, 3 Mar. 128; *Steele v. Logan*, 3 Mar. 394.

(18) **Issue involved** is whether party complaining was or was not in the actual possession of the premises forcibly entered, no question of title or right of possession can arise, nor does it make any difference whether the defendant had or had not the right to enter. *Dils v. Justice*, 10 R. 547.

(19) The only legitimate inquiry on the trial of a writ for forcible entry and detainer is whether the defendant entered upon land which at the time of the entry was in the actual possession of the plaintiff. The defendant can not

justify an entry in such case by showing title or right of entry. *Hunt v. Wilson*, 14 B. M. 44.

(20) Where one trespasser succeeds another in the possession of land the person in possession when first trespasser entered may maintain writ of forcible entry against each trespasser. *Alexander v. Fowler*, 6 R. 444.

(21) To maintain writ of forcible entry plaintiff must have been at time of entry in the actual possession of the premises. Neither right of possession nor constructive possession is sufficient. *Dils v. Justice*, 10 R. 547.

§ 454. (1) **Police judge** having concurrent jurisdiction with justices of the peace can issue the writ. *Cessna v. Stedman*, 1 Duv. 188. See sec. 732-13; as to jurisdiction of police judges, see Ky. Stat.

(2) **Requisites of warrant.** It is necessary that the warrant for forcible detainer should charge that the complainant was in the peaceable possession of the premises, and the relation of landlord and tenant should be alleged, or in some form appear on the face of the warrant.

forcible entry [or forcible detainer] aforesaid; and give to the said C D and E F at least three days' notice of the time and place of the meeting of the jury, and have then there this writ. Witness, etc."

[In the trial of writs of forcible entry, forcible detainer, or forcible entry and detainer, if neither party, in person or by agent or attorney, demand a jury, the trial thereof shall be by the judge or justice presiding; and in such event the judge or justice shall try all questions arising, whether of law or of fact. No such writ shall hereafter direct the summoning of a jury, and the sheriff or other officer to whose hands such writ may come to do execution thereof shall not summon a jury in such proceeding, unless he be by either party notified in writing that a jury is demanded. At the calling of the cause for trial either party may demand a jury. The right to traverse the finding of the judge or justice shall be the same as if a verdict had been rendered by a jury.] (*Words in brackets added by act of 1888.*)

§ 455 (503) **Warrant, how executed.** The officer shall give to each defendant notice, according to the directions of the warrant, and no inquiry shall be made against any defendant who has not been notified as aforesaid. If, however, the notice have been given to a defendant, but not three days before the day of the meeting of the jury, the inquest shall, on his motion, be adjourned until the expiration of the three days. (*Service of notice if defendant can not be found, see Ky. Stat., sec. 2294.*)

§ 456 (504) **Return of warrant—jury—oath to jury.** At the time for holding the inquisition, the officer shall return the warrant to any justice who may attend, or to the county judge, if in attendance, with an indorsement stating when and upon whom it was executed and the place designated by the officer for holding the inquisition, together with a panel of the jury; whereupon, the justice or judge, whether the defendant is present or not, shall administer an oath to the jurors in substance as follows: "You, and each of you, shall well and truly inquire into and return whether or not the defendant [or defendants]

Powers v. Sutherland, 1 Duv. 151; Taylor v. Monohan, 8 Bush 238; 2 Duv. 143.

(3) Warrant may charge a forcible entry or detainer in the alternative. Carpenter v. Shepherd, 4 Bibb 501; McBrayer v. Wash, 6 J. J. M. 465; they are distinct offenses, but the jury may find the de-

fendant guilty of one and not the other. Cammack v. Macey, 3 Mar. 297; Rowe v. Powell, 4 J. J. M. 153.

(4) Form of warrant given in statute is chiefly directory, and a substantial compliance with it is sufficient. Smith v. White, 5 Dana 381, and a general description of the premises is sufficient.

is [or are] guilty of the forcible entry [or detainer] complained of in the warrant in this cause: so help you, God." (*Jury not summoned unless demanded, see sec. 454.*)

§ 457 (500) **Duty and powers of justice at trial.** Such justice or judge shall superintend the taking of the inquisition, swear witnesses, decide legal questions which may arise, preserve the peace, enforce the rules of decorum, and punish, according to law, contempts of his authority.

§ 458 (500) **Subpoenas for witnesses—attendance coerced.** The judge or any justice of the peace may issue subpoenas for witnesses at the request of either party, and their attendance and testifying may be coerced by the justice or judge who presides at the inquest. (*Form of subpoena, page 643.*)

§ 459 (501) **Verdict—proceedings if jury disagree.** The jurors, after hearing the evidence, shall, by their inquest, say whether the defendants, or either of them, be guilty or not guilty of the forcible entry or detainer complained of; and shall return their inquest, signed by one of their body, to the justice of the peace or judge who presides. If the jury do not agree, it may be discharged, and another be ordered to be summoned to meet, either immediately, or at some future day to be then and there fixed and indorsed on the warrant; and this proceeding shall be continued until a jury agree.

§ 460 (502) **Judgment on inquest—form of.** Upon the return of the inquest the judge or justice shall enter a judgment according to the inquisition, either for the plaintiff, in substance, that he have restitution of the premises aforesaid, and recover of the defendants his costs in this behalf expended; or for the defendants, in substance, that they recover of the plaintiff their costs in this behalf expended; or for the plaintiff against some of the defendants, and for the other defendants against the plaintiff, if some be found guilty and others not guilty.

§ 461 (503) **Proceedings if no traverse—warrant of restitution.** If the party against whom the inquisition is found fail to file a traverse of the inquisition with the judge or justice who presided, on or before the third day after the finding of the inquest, the judge or justice shall, on request, issue his execution for the costs; and, if the inquisition be in favor of the plaintiff, he shall also issue his warrant of restitution in substance as follows: "—— County. To the Sheriff [or any con-

§ 459. (1) **Verdict—form of.** A verdict in the country finding the defendant "not guilty" is sufficiently explicit. *Belcher v. Barrett*, 4 Met. 308.

(2) Verdict finding a forcible detainer

in a writ for forcible entry is not good, nor is a verdict for forcible entry under a warrant for forcible detainer. *Gayle v. Overton*, 1 J. J. M. 549; *Sinclair v. Sanders*, 3 J. J. M. 303.

stable] of ——— county: Whereas, C D and E F have, by an inquisition taken before me, J P, a justice of the peace for said county, been found guilty of a forcible entry in [or detainer of] one house and field, lying on the waters of ———, in the county aforesaid [or other general description of the possessions], to the injury of A B: You are, therefore, in the name of the Commonwealth of Kentucky, commanded that, with the power of the county if necessary, you put the said A B in the possession of said premises; and make return within ——— days to me, how you have executed this warrant. Given under my hand this — day ———. ———, J. P.”

§ 462 [510] **Justice to preserve all papers—fee for transcript.** The judge or justice of the peace shall carefully preserve all papers, records and proceedings, relating to the cause, unless he transmit them to the clerk as hereinafter directed; and shall deliver, to any person requiring it, a transcript thereof, such person paying him therefor two cents for every twenty words in such transcript.

§ 463 [511] **Traverse—time to file—bond to be executed.** If either party conceive himself aggrieved by the finding of the jury, he may file a traverse thereof with the judge or justice, within three days next after the finding aforesaid, in substance as follows: “*A B against C D, on a writ of forcible entry [or detainer]*. The plaintiff [or the defendant] says that the inquisition returned in this cause is not true; wherefore, he prays that proceedings thereon may be stayed until the same can be tried according to law. A B;” and shall also, within the same time, before said judge or justice, give bond with sufficient surety, to be approved by the judge or justice, to his adversary, in substance as follows: “*A B v. C D, on a writ of forcible entry [or detainer]*. Whereas, upon a writ of forcible entry [or detainer] in favor of A B against C D, tried before ———, a justice of the peace of ——— county, a verdict was rendered for the said A B, on the — day of ———, which the said C D has traversed; the said C D and E F, his surety, covenant to pay to the said A B the costs of said

§ 463. (1) **Traverse.** If the traverse bond is defective, the court should allow the traverser a reasonable time in which to execute a new and sufficient bond, as provided in sec. 682. *Alderson v. Trent*, 79 Ky. 250.

(2) Justice can not be compelled by mandamus to accept a traverse bond that he has declined to approve because in his judgment insufficient. *McDonald v. Jenkins*, 93 Ky. 249.

(3) The traverse must be filed with the justice within three days, and the traverse bond executed within the same time, but if the traverse is filed in time, without a sufficient bond, the bond may be executed in the circuit court. *Burchett v. Blackburn*, 4 Bush 553.

(4) The traverser need not sign the traverse. *Jones v. Skiles*, 1 Mar. 54: and a traverse bond executed by a surety alone is sufficient. *Smith v. Turley*, 3 Bibb 188.

proceeding and all damages caused to him by said traverse, if not prosecuted with effect." whereupon, the judge or justice shall stay all further proceedings on the inquisition, and return the whole of the papers and proceedings, or a fair transcript thereof, to the office of the circuit court of said county, within ten days thereafter.

§ 464 (512) **Damages recoverable on traverse bond.** Upon this bond, if the traverser fail to prosecute his traverse with effect, he and his surety shall be liable for the damages for withholding the possession which the traversee may be entitled to recover against the traverser, during the pendency of the traverse, either in the circuit court or Court of Appeals, as well as the reasonable expenses of the traversee in defending the traverse.

§ 465 (512) **Proceedings on traverse in circuit court.** The clerk shall docket the traverse as other actions; it shall stand for trial as docketed; the traversee shall join issue on the traverse; and it shall be tried by a jury, and judgment given on the verdict, as in other cases: *Provided, however,* that nothing herein contained shall be construed to prevent the court from giving judgment against either party for default, nor from deciding any question of law as in other cases.

§ 466 (514) **Proceedings in circuit court after judgment.** After a cause is returned to the circuit court, execution for cost, or for restitution, shall issue from the office of that court, according to the judgment in the cause.

(5) **Return of papers to circuit court.** The provision as to the return of the papers to the circuit court within ten days is merely directory, and the failure to comply with it no cause for dismissal. *Wayman v. Taylor*, 1 Dana 527.

§ 465. (1) **Parties on traverse.** On the traverse no new parties can be made by amendment, the same identical case tried in the country must be tried in the circuit court. *Powers v. Sutherland*, 1 Duv. 151.

(2) **Trial of traverse.** "This class of proceedings should always be reviewed with great liberality. Errors which are merely formal or technical should be disregarded." *Powers v. Sutherland*, 1 Duv. 151; *Taylor v. Monohan*, 8 Bush 238.

(3) On the trial of the traverse, the circuit court may quash a defective warrant. 1 Duv. 151; 8 Bush 238.

(4) If the traverser fail to appear on the calling of the traverse the court may

render judgment against him by default. *Dibble v. Porter*, 1 Duv. 190.

(5) The failure of the justice to render judgment on the verdict of the jury is no ground for dismissing the traverse in the circuit court. Such judgment is not necessary to enable a party to maintain a traverse. *Belcher v. Barrett*, 4 Met. 308.

(6) Upon the trial of the traverse, the burthen of proof is on the party who obtained the warrant (*Beauchamp v. Morris*, 4 Bibb 312); and he shall have restitution according to the proof, though it be for less than he demands, and less than the jury in the country gave him. *Atchley v. Latham*, 3 Mar. 164.

(7) A traverse is a virtual waiver of objections to irregularities in the proceedings before the justice not affecting the merits of the case. *Swartzwelder v. Bank*, 1 J. J. M. 39; *Wheatley v. Price*, 3 J. J. M. 187; *Jones v. Skiles*, 1 Mar. 39; 2 Bibb 434; 1 Dana 468.

§ 467 [§18] **Waste may be restrained pending trial.** The court before whom such cause may be depending, or any judge thereof in vacation, may restrain waste or destruction of the premises, and may enforce its order by fine and imprisonment or either.

§ 468 [§19] **Proceedings no bar to action for rent, trespass, waste.** The proceedings under a writ of forcible entry or detainer shall not bar an action for trespass or waste or rent or mesne profits.

§ 469 [§17] **Limitation two years.** No inquisition of forcible entry or forcible detainer shall be taken at any time after two years from the forcible entry or detainer complained of.

CHAPTER IX.

PROBATE OF WILLS.

§ 470. Kentucky Statutes—concerning adopted.

§ 470 [§19] **Kentucky Statutes—concerning adopted.** The provisions of sections twenty-six to forty-two inclusive of chapter one hundred and thirteen, General Statutes [now sections four thousand eight hundred and forty-nine to four thousand eight hundred and sixty-six, both inclusive, of chapter one hundred and thirty-five of the Kentucky Statutes], regulating the probate of wills, are adopted as a part of this Code. (*Venue of action to establish, or set aside, sec. 64.*)

CHAPTER X.

SETTLEMENT OF THE ACCOUNTS OF FIDUCIARIES BY THE COUNTY COURT.

§ 471. Kentucky Statutes—concerning adopted.

§ 472. Settlements of fiduciaries—recording of.

14 ~~chapter~~ § 471 [§20] **Kentucky Statutes—concerning adopted.** The provisions of article chapter twenty-eight, General Statutes [now sections one

(8) A judgment of restitution may be given against those who were engaged in making the unlawful entry, although they did not detain the premises afterward, as well as against those who continued in the occupation of them. *Young v. Ringo*, 1 Litt. 225.

§ 470. **Settlement with guardian.** A suit

in equity may be brought by a guardian against a former guardian to require him to settle his accounts, although the county court has referred the matter of a settlement of his accounts to a commissioner. *Com. v. Henshaw*, 2 Bush 286. And see *McAfee v. Balden*, 6 Bush 537.

thousand and sixty-two to one thousand and sixty-seven inclusive, of the Kentucky Statutes, regulating the settlement of the accounts of personal representatives and guardians, are adopted as part of this Code.]

§ 472 [551] **Settlements of fiduciaries—recording of.** The accounts of committees and trustees may be settled in the same manner, and the settlements shall have the same effect, as prescribed by section four hundred and seventy-one. The county court of the county in which the committee is appointed, or in which the deed or will creating the trusts is recorded, shall have the jurisdiction of making the settlements.

[That hereafter, when the court may so direct, settlements of the accounts of personal representatives, trustees, guardians or other fiduciary, made before a commissioner of any chancery, common pleas, or circuit court of this State, and reported by such commissioner, and all reports of estates or funds received or disbursed, under order of the court, by its receiver, after the same shall have been confirmed by the court, shall be recorded by the clerk of such court in a book to be provided for that purpose.

The vouchers accompanying such settlements or reports shall not be recorded.

The clerk of such court shall be entitled to the same fees allowed by law to clerks of the county courts for similar services.

The commissioner or receiver of the court making such settlement or report shall allow, and state on the face thereof, the amount of fees that will be due to the clerk for recording.] (*Words in brackets, act 1884.*)

CHAPTER XI.

CAVEATS.

- § 473. 1. Who may enter—statement and verification of.
2. Copy to be filed with circuit clerk.
3. Caveat treated as petition—proceedings upon.
4. Summons on—practice.

§ 472. **Jurisdiction.** Where an express trust is created by will or deed and the trustee desires simply to settle his accounts, he must go to the county court

where the evidence of the trust or the writing is recorded. *Cunningham v. Fraize*, 85 Ky. 35.

5. Judgment—provisions as to.
6. Grant not to issue until caveat disposed of.
7. Plaintiff—when not entitled to caveat.
8. Costs—court may require security for.

§ 473 [533] **Who may enter—statement and verification of.** 1. If any person obtain a survey of land to which another claims a better right, such other may enter a caveat with the register to prevent the issuing of a grant until the right be determined. The caveat shall state the plaintiff's claim and the reasons why the grant should not issue. It shall be verified by his affidavit, or by that of his agent, and declare that it is entered in good faith, with the intention of procuring the land for the plaintiff, and not for the benefit of the person against whom it is entered.

2. **Copy to be filed with circuit clerk.** A copy of the caveat, certified by the register, shall, within sixty days from the time it is entered, be lodged with the clerk of the circuit court of the county where the land or the greater part thereof lies. Failure so to lodge such copy shall be deemed an abandonment of the caveat; and it may be disregarded by the register, upon the clerk's certificate of such failure being filed in his office.

3. **Caveat treated as petition—proceedings upon.** If such copy be lodged within said period, it shall be treated as a petition, and the proceedings upon it shall be the same, including an appeal to the Court of Appeals, as those in an ordinary action.

4. **Summons on—practice.** If the summons be not returned in due time, or be returned not executed, the caveat shall be dismissed, if it be shown that the non-execution or non-return was procured by the plaintiff or resulted from his neglect.

5. **Judgment—provisions as to.** A copy of the judgment, if in favor of the defendant, must be delivered into the land office within three months from the time it is rendered; or a new caveat may, for that cause, be entered against the grant. If the judgment be for the plaintiff, and a copy thereof be not delivered into the land office within six months from the time it was rendered, any other person may, for that cause, enter another caveat against the grant.

6. **Grant not to issue until caveat disposed of.** No grant shall issue to the land in contest, to the plaintiff in the caveat, or to another for his use, until the caveat be dismissed or decided; and any such grant, to the extent of such land, shall be void.

§ 473. **Construction of this section.** Preston v. Preston, 85 Ky. 16; Alexander v. Noland, 88 Ky. 142.

7. **Plaintiff—when not entitled to caveat.** If the plaintiff do not prosecute his caveat as herein required, or if the same be dismissed or decided against him, neither he nor any other for his use shall have another caveat against the same grant.

8. **Costs—court may require security for.** The court may, in its discretion, require the plaintiff to give security for costs; and upon his failure to do so may dismiss the proceeding.

CHAPTER XII.

WRITS OF MANDAMUS AND PROHIBITION.

§ 474. How obtained and prosecuted.

§ 475. Court to hear and decide—final order.

§ 476. Temporary preventive orders may be made.

§ 477. Mandamus defined.

§ 478. Commonwealth may appeal without security.

§ 479. Prohibition defined.

§ 474 [533] **Writs of—how obtained and prosecuted.** Writs of mandamus, except those used by a court for enforcing its judgments or orders, and writs of prohibition shall be obtained by motion, and prosecuted in

§ 474. (1) **Definition of mandamus.** The writ of mandamus is not now, as formerly, a high prerogative writ, emanating from the grace or favor of any one, but it is a statutory writ or order of a court of competent jurisdiction, and in a proper case is to be granted on the motion of any party aggrieved. *Maddox v. Graham*, 2 Met. 56.

(2) We have no other than peremptory writs of mandamus; it can not be in the alternative. 10 Bush 564.

(3) **Defense against.** In a proceeding by mandamus, a counter-claim to recover back money paid on the contract is not proper; but if the defendant state sufficient reasons for not paying the claim, the writ will not be awarded. 18 B. M. 848.

(4) **Discretion not controlled.** The performance of a plain, positive duty may be compelled by mandamus, but where there is a discretion as to the result that may be arrived at, it can not be controlled. If an inferior tribunal has a discretion, and proceeds to exercise it, its discretion can not be controlled by

mandamus, but if it refuses to entertain a question which the law has enjoined upon its consideration, mandamus will lie. A mandamus may be issued against a county court to require it to consider the propriety of building a bridge on a county road, under sec. 29, art. 1, chap. 94, Gen. Stat.; but when it has considered it, and refused to build, it can not be compelled to do so. *Com. v. Boone Co.*, 82 Ky. 632; see *Nelson Co. v. Washington Co.*, 14 B. M. 92; *Dickens v. Cave Hill*, 93 Ky. 385.

(5) Mandamus will not lie to control the exercise of a judicial discretion. *City v. Kean*, 18 B. M. 9; *Goheen v. Myers*, 18 B. M. 423; *Gayle v. Owen Co.*, 83 Ky. 61; *City v. Berry*, 80 Ky. 354; *Ohio Co. v. Newton*, 79 Ky. 267; *Wright v. Baker*, 94 Ky. 343.

(6) Mandamus lies to compel an inferior judicial tribunal to act, but not to control its judgment. *Cassidy v. Young*, 92 Ky. 227; to set a court in motion but not to control its decision. *Shine v. Ky. Central R. R.*, 85 Ky. 177.

(7) County court will not be compelled

the manner provided in title ten, chapter five, except that the applicant shall file a petition, wherein he shall state the cause and ground of his application before giving notice of his motion; to which the party against whom the mandamus or prohibition is sought shall file a demurrer or an answer, at or before the time fixed for making the motion.

§ 475 [524] **Court to hear and decide—final order.** The court shall hear and decide all questions of law or fact arising on the motion, and the granting or refusing of the writ shall be the final order on the motion. (*The amendment of May 15, 1886, was repealed by act of January 13, 1888.*)

by mandamus to probate a will; where the court has heard evidence and determined that it had no jurisdiction, the remedy is by appeal. *Preston v. Fidelity Trust Co.*, 94 Ky. 295.

(8) Justice of the peace will not be compelled by mandamus to approve a traverse bond which he regards as insufficient. *McDonald v. Jenkins*, 93 Ky. 249.

(9) **Injunction can not stay.** A court of equity can not enjoin an officer from doing an act which a court of law has by writ of mandamus required him to do. 10 Bush 564.

(10) **Interpleader.** When a party has applied for a mandamus against a ministerial officer (the auditor) to compel him to issue his warrant, a third party will not be allowed to come in and litigate his claim with the plaintiff upon the ground that he has a lien upon the debt due him. *Hewitt v. Craig*, 86 Ky. 23.

(11) **Legal duty to perform act must appear.** It must appear upon every application for a mandamus that it is the legal duty of the respondent to do that which it is sought to compel him to do, and that upon proper application he refused to perform that duty. *Lowe v. Phelps*, 14 Bush 642; *Norman v. Board of Mgrs.*, 93 Ky. 537.

(12) **Mandamus—when granted.** Mandamus is the proper remedy to prevent the clerk and judge of the county court from recording the vote under a "local option" law, if the law is unconstitutional. *Gayle v. Owen Co.*, 83 Ky. 61.

(13) And to compel the clerk of the county court to record a deed or other

instrument which it is made his duty to record. *Wulfstange v. McCollom*, 83 Ky. 361.

(14) And to require the county court to show cause why it did not permit a deputy sheriff to qualify. *Applegate v. Applegate*, 4 Met. 236; see *Prater v. Strother*, 11 R. 831.

(15) And to compel the county judge to accept the bond of a sheriff and permit him to qualify. *Cate v. Ross*, 2 Duv. 243; and to compel the State Board of Pharmacy to enter a "graduate in pharmacy." *State Board v. White*, 84 Ky. 626.

(16) And to compel county court to levy a tax to pay a medical account for services rendered to a poor person by request of the county judge and justices. *Rodman v. Larue Co.*, 3 Bush 144.

(17) And to compel county court to levy a tax to pay for a bridge built, under a contract with the county. *Anderson Co. v. Stone*, 18 B. M. 848.

(18) And to compel examining board to compare poll-books to perform their duty. *Clark v. McKenzie*, 7 Bush 523; *Batman v. Megowan*, 1 Met. 533; *Howes v. Walker*, 92 Ky. 258; but mandamus will not lie to compel the canvassing board to recanvass the ballots on account of error in the first canvass, as the party aggrieved by the former canvass has a remedy by contesting the election. *Houston v. Steele*, 16 R.—

(19) And to require trustees of a town to repair the streets. *Hammar v. City*, 3 Met. 494; *Trustees v. Kinner*, 12 Bush 334.

§ 476 [535] **Temporary preventive orders may be made.** During the pendency of the motion, the court or judge, in vacation, may make temporary orders for preventing damage or injury to the applicant until the motion is decided.

§ 477 [536] **Mandamus defined.** The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and is granted on the motion of the party aggrieved, or of the Commonwealth when the public interest is affected.

(20) And against auditor, to compel him to pay claims. *Auditor v. Adams*, 13 B. M. 151; *Haly v. Auditor*, 4 Bush 490; 14 Bush 284; 3 Bush 231; 80 Ky. 336; 78 Ky. 577; 8 Bush 98.

(21) Corporation may be compelled by mandamus to elect officers. *Orr v. Bracken Co.*, 81 Ky. 593.

(22) Where county is divided and a new county established, the old county may by mandamus compel the new to levy a tax to pay indebtedness created before division. *Montgomery Co. v. Menefee Co.*, 93 Ky. 33.

(23) When a city council is authorized and required to levy and collect a tax to pay the interest on bonds, a writ of mandamus may be maintained by any of the bondholders to compel it to discharge that duty. *Maddox v. Graham*, 2 Met. 56.

(24) A county bondholder may compel by mandamus the county court to levy and collect a tax to pay bonds issued by the county. *Elliott Co. v. Kitchen*, 14 Bush 289. And a corporation may have the writ to compel the county to issue bonds in compliance with a subscription. *C. & O. R. R. Co. v. Washington Co.*, 10 Bush 564.

(25) **Mandamus—when not granted.** A person who is not eligible to hold office can not have a mandamus to compel the county judge to permit him to qualify, although he received a majority of the votes cast at the election. *Atchinson v. Lucas*, 83 Ky. 451; and see notes 4-8.

(26) Nor will it lie against officers of a private corporation, *Cook v. College*, 9 Bush 541; nor to compel the officers of a

benefit society to restore an expelled member. *Schmidt v. Lodge*, 84 Ky. 490.

(27) Nor will mandamus lie where party has any other adequate remedy, such as right of appeal. *Shine v. Ky. Central R. R.*, 85 Ky. 177.

(28) An *ex parte* allowance made by the circuit court to guards summoned by its order to guard the jail is only *prima facie* evidence of its correctness, and, when controverted by the county court, mandamus will not lie to compel the county court to levy a tax to pay the allowance. *Justice's v. Moore*, 2 Bush 108.

(29) Nor is it the proper remedy when the amount of the demand is not ascertained. *Garrard Co. v. McKee*, 11 Bush 234.

(30) **Motion for.** Failure to make the motion for a mandamus on the day specified is a waiver of the right to enter or make it under that notice. 14 Bush 289.

(31) **Parties to action.** Mandamus against county court to compel it to levy a tax must be against persons composing the court. *Montgomery Co. v. Menefee Co.*, 93 Ky. 33.

(32) **Power of Court of Appeals** to issue writ is mentioned in *Preston v. Fidelity Trust Co.*, 94 Ky. 295, but not decided; and see *Rohmeiser v. Bannon*, 15 R. 114. In *Kelley v. Toney*, 95 Ky. 338, and *Louisville School of Reform v. City*, 88 Ky. 584, it is held that mandamus from Court of Appeals is proper remedy to compel lower court to grant an appeal which has been refused without right; and see *Vance v. Field*, 89 Ky. 178.

§ 478 ⁽⁵²⁷⁾ **Commonwealth may appeal without security.** If an interest, right or claim of the Commonwealth be affected by the final order on an application for a writ of mandamus, the Attorney-General may prosecute an appeal without security.

§ 479 ⁽⁵²⁸⁾ **Prohibition defined.** The writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction. (*See further, Criminal Code, sec. 25.*)

CHAPTER XIII.

REPEALING OR VACATING CHARTERS, AND PREVENTING THE USURPATION OF AN OFFICE OR FRANCHISE.

- § 480. Ordinary action to be brought.
- § 481. Action to repeal charter—prosecution of.
- § 482. Legislative direction necessary to repeal charters.
- § 483. Usurper of office or franchise—action against.
- § 484. Commonwealth attorney to institute action, when.

(33) **Successor of officer.** A change in the membership of the board of councilmen does not abate the proceedings. *Maddox v. Graham*, 2 Met. 56; *City v. Kean*, 18 B. M. 9. As to auditor, see 3 Bush 231; as to board of examiners to compare poll-books, see 7 Bush 523.

(34) **Supersedes** The execution of a writ of mandamus may be superseded. 83 Ky. 451.

§ 479. (1) **Prohibition.** Court of Appeals will not grant a writ of prohibition. *Sasseen v. Hammond*, 18 B. M. 672; but see now Constitution, sec. 110, and *Preston v. Fidelity Trust Co.*, 94 Ky. 295.

(2) When a matter is within the jurisdiction of the court, a writ of prohibition will not be awarded to prevent it from deciding erroneously, or from enforcing an erroneous judgment or order. *Bank Lick Co. v. Phelps*, 81 Ky. 613.

(3) When by the provisions of a city charter the validity of an ordinance could be determined by a writ of prohibition; in a controversy growing out of the enforcement of an ordinance, the ordinance being valid, the writ was not the proper remedy. *Shinkle v. City*, 83 Ky. 420.

(4) Where the county court is acting under a statute that is unconstitutional, and its only authority is under the statute, the writ of prohibition is the proper remedy to stay proceedings under it. *Pennington v. Woolfolk*, 79 Ky. 13.

(5) A writ of prohibition can only be directed to a judicial tribunal, and not to a legislative body, such as a city council. *Patton v. Stephens*, 14 Bush 324.

(6) After dismissing an appeal for want of jurisdiction, the circuit court properly refused a writ of prohibition against the enforcement of the judgment by the justice who rendered it. *Olmstead v. Mason*, 3 Bush 693.

(7) A temporary order prohibiting a court of inferior jurisdiction from proceeding in a certain case pending the hearing of a writ of prohibition does not continue in force after writ is refused, although the judgment refusing writ is superseded. *Gibbs v. Board of Aldermen*, 95 Ky. 471.

(8) A writ of prohibition will not be granted where the inferior court sought to be restrained has jurisdiction. *Goldsmith v. Owen*, 95 Ky. 420.

§ 485. Attorney-General—when to institute.

§ 486. Person holding office, when a usurper.

§ 487. Usurper—judgment to be rendered against.

§ 488. Fees received by usurper—how recovered.

§ 480 [533] **Ordinary action to be brought.** In lieu of the writs of *scire facias* and *quo warranto*, or of an information in the nature of a *quo warranto*, ordinary actions may be brought to vacate or repeal charters, and to prevent the usurpation of an office or franchise. (*Verification of pleadings not required, sec. 116.*)

§ 481 [533] **Action to repeal charter—prosecution of.** The action to repeal or vacate a charter shall be in the name of the Commonwealth, and be brought and prosecuted by the Attorney-General, or under his sanction and direction by an attorney for the Commonwealth.

§ 482 [533] **Legislative direction necessary to repeal charters.** Actions to repeal or vacate the charters of municipal corporations; banks, railroad, turnpike road and internal improvement companies, shall only be instituted by order of the Legislature, unless otherwise expressly provided. (*See now Ky. Stat., sec. 569.*)

§ 483 [533] **Usurper of office or franchise—action against.** If a person usurp an office or franchise, the person entitled thereto, or the Commonwealth, may prevent the usurpation by an ordinary action.

§ 484 [533] **Commonwealth attorney—when to institute action.** It shall be the duty of the several Commonwealth attorneys to institute the actions mentioned in this chapter against usurpers of county offices or franchises, if no other person be entitled thereto, or if the person entitled fail to institute the same during three months after the usurpation.

§ 480. (1) **Lottery—action to suppress.** An action to prevent the exercising of lottery privileges may be instituted by the Attorney-General, in the name of the Commonwealth. *Com. v. Frankfort*, 13 Bush 185.

(2) **Usurpation of office.** An action may be instituted by one who has been duly elected to the office of city judge to prevent the usurpation of that office by another, and to compel the usurper to surrender the office and records to him. *Boyd v. Chambers*, 78 Ky. 140. See further, *Collopy v. Cloherty*, 95 Ky. 330.

(3) A fine for usurpation of an office can not be recovered in a proceeding under this chapter. *Com. v. Adams*, 3 Met. 7.

(4) The provisions of the Code pointing

out the mode by which a person who usurps an office to which he is not entitled may be deprived of it, do not preclude an inquiry into the legality of his title to the office when it is directly put in issue in an action against the officer. *Patterson v. Miller*, 2 Met. 493; and see *Com. v. Jones*, 10 Bush 725.

(5) In action by Commonwealth for usurpation of office, burden is on defendant to show by what authority he holds office, but where citizen sues to recover office burden is on him to show right to it. He can not recover on ground that defendant has no right to office. *Tillman v. Otter*, 93 Ky. 600, and see *Toney v. Harris*, 85 Ky. 453.

§ 483. **Usurpation of franchise.** See *Com. v. City of Frankfort*, 13 Bush 185.

§ 485 [534] **Attorney-General—when to institute.** For usurpation of other than county offices or franchises, the action by the Commonwealth shall be instituted and prosecuted by the Attorney-General.

§ 486 [535] **Person holding office, when a usurper.** A person who continues to exercise an office after having committed an act, or omitted to do an act, the commission or omission of which, by law, creates a forfeiture of his office, may be proceeded against for usurpation thereof.

§ 487 [536] **Usurper—judgment to be rendered against.** A person adjudged to have usurped an office or franchise shall be deprived thereof by the judgment of the court, and the person adjudged entitled thereto shall be placed in possession thereof; but no one shall be adjudged entitled thereto, unless the action be instituted by him. And the court shall have power to enforce its judgment by causing the books and papers, and all other things pertaining to the office or franchise, to be surrendered by the usurper; and by preventing him from further exercising or using the same; and may enforce its orders by fine and imprisonment until obeyed.

§ 488 [537] **Fees received by usurper—how recovered.** If the usurper have received fees and emoluments arising from the office or franchise, he shall be liable therefor to the person entitled thereto, who may claim the same in the action brought to deprive him of the office or franchise, or in a separate action. If no one be entitled to them, they may be recovered by the Commonwealth, and shall be paid into the public treasury.

CHAPTER XIV.

SALES OF REAL PROPERTY OF PERSONS UNDER DISABILITY, ETC.

§ 489. Sale of real estate of infants and persons of unsound mind.

§ 490. Real estate of joint owners—sale of.

§ 491. Reversion or remainder may be sold.

§ 492. Sales under sections 489, 491.

§ 493. Bond to be executed—provision as to married women.

§ 494. Concerning sales, proceeds of sale, parties.

§ 495. Dower—sale of and compensation for.

§ 496. Bond—when not required.

§ 497. Purchase money—when to remain lien on land.

§ 498. Joinder of parties.

§ 489. **Sale of real estate of infants and persons of unsound mind.** A vested estate of an infant or of a person of unsound mind, in real property, may be sold by order of a court of equity—

§ 489. (1) **Contingent interest—sale for investment.** Where land was devised to children with provision that if either should die without issue his share should

1. *Debt of ancestor to pay.* For the payment of any debt or liability of his ancestor or devisor with which he may be legally chargeable, in an action brought against him pursuant to section four hundred and twenty-eight; or in an action brought against him by a creditor of the ancestor or devisor, unless it be enjoined pursuant to section four hundred and thirty-six.

2. *Debt of creditor to pay.* For the payment of his debt or liability, in an action brought against him by his creditor.

3. *Maintenance and education of ward.* In an action by a guardian against his ward, for a sale of the estate for the maintenance and education of the ward. (*See Ky. Stat., sec. 2034.*)

4. *Maintenance of lunatic and family.* In an action by a committee of a person of unsound mind against him, for a sale of the estate for his maintenance, or for the maintenance of himself and his family, including the education of his infant children.

go to survivor, the interest of one may be sold and proceeds reinvested in land to be held in same manner as land sold. *Harris v. Anderson*, 3 R. 237; and see *Tyler v. Jewell*, 10 R. 887; see note 5 sec. 490.

(2) **Decree is necessary** in order to pass title to land owned by infants. *Bill v. Burgess*, 15 R. 41; see note 7 sec. 490.

(3) **General Statutes**, chapter 66, article 6 (edition 1873), providing for sale of infant's real estate, was not repealed by Code. *Newman v. Ecton*, 14 R. 793. The statute referred to was omitted from General Statutes in editions edited by Bullitt & Feland, because they believed the Code provisions repealed, impliedly at least, the statute. This was also omitted from the Ky. Stat.—Ed.

(4) **Grounds of sale.** Under this section the real estate of an infant can only be sold for his debts or a liability with which he is chargeable, or under a decree in an action brought by his statutory guardian to obtain means for his support or education or a reinvestment of the proceeds. *Tyler v. Jewell*, 10 R. 887.

(5) **Improvements.** Sale of portion of infant's land for the purpose of improving remainder is void because not authorized by statute. *Hays v. Bradley*, 15 R. 387.

(6) **Purchaser under void sale of in-**

fant's real estate, who has in good faith erected improvements, is entitled as against the infants to recover the amount that improvements have enhanced the value of the land. *Wornack v. Loar*, 11 R. 6; *Hays v. Bradley*, 15 R. 387.

(7) **Infant's real estate—sale of.** As to defense by infants and appointment of guardian *ad litem*, see notes to sec. 36; service of summons on; see sec. 52.

(8) It was held under old Code that so much of the real estate of an infant heir as may be necessary to pay the debts of the ancestor may be sold in a proceeding for that purpose, but if more than is necessary for that purpose is ordered to be sold, except as provided in this chapter, the judgment will be void. *Gill v. Given*, 4 Met. 197.

(9) **Powers of courts of equity** to sell and reinvest infant's real estate, or that of persons under disability, are statutory, and not inherent. *Walker v. Smyser*, 80 Ky. 620; *Henning v. Harrison*, 13 Bush 723; and the chancellor has no inherent power to order a sale. The statute regulating sales must be followed. *Meddis v. Bull*, 13 R. 767.

(10) **Practice.** A purchaser can not, after the confirmation of the sale, and after the expiration of the term at which confirmation was made, resist the payment of the purchase money because of irregularities in proceedings under which

5. **Reinvestment—sale for.** In an action against a person of unsound mind by his committee; or against an infant by his guardian; or, if the infant be a married woman, by her husband, if he be twenty-one years of age, if not, by her next friend, for a sale of the estate and investment in other property. (*Venue of action, secs. 62, 65; as to defense by, and service of summons on, see secs. 36, 52, 53.*)

§ 490 (542, 543) **Joint owners—real estate of may be sold.** A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant—

the sale was made. *Todd v. Dowd*, 1 Met. 281.

(11) **Proceeds of sale** under subsection 5 of this section, or under section 491, may be applied if necessary to education and maintenance of ward, if action is brought by guardian under subsection 3. *Sawyer v. Guscuth*, 3 R. 592.

(12) **Venue of action.** In an action for the sale of land and division of proceeds among some of the heirs, and reinvestment as to others, land situated in other counties than that in which action is pending may be sold, when the ancestor died in and part of the land was located in county where action was brought. *Phalan v. Louisville Trust Co.*, 88 Ky. 24.

(13) **Void sale.** Judgment directing sale of infants' real estate without any person having been summoned as required by sec. 52 is void. *Wornack v. Loar*, 11 R. 6.

§ 490. (1) **Amended petition—process.** In an action for the sale of infant's real estate, process is necessary on an amended petition asking sale of land not mentioned in petition. *Howard v. Singleton*, 94 Ky. 336.

(2) **Appraisal of land** is not necessary in an action by devisees to have it sold on account of its indivisibility. *Southwick v. Greuzenbach*, 12 R. 263.

(3) **Assignee of joint owner** may maintain action to have indivisible real estate sold. *Hill v. Cornwall*, 95 Ky. 512.

(4) **Bond to infant.** Where real estate is owned by persons, some of whom are infants and others married women, and a proceeding is instituted to sell it under subsection 2 of sec. 490, the execution of

the bond provided by sec. 493 is not necessary, but the purchase price shall not be paid by the purchaser, but shall remain a lien on the land as provided in sec. 497. Nor is a privy examination of the married woman, whether infant or adult, necessary in a case like this to pass the title to the purchaser. *Kendall v. Briggs*, 81 Ky. 119.

(5) **Contingent interest.** Land devised to a mother and "her children," they being in possession, may be sold, and if order directs investment of fund to be held in same manner as land sold, the purchaser takes a good title, although other children may be born. *Tyler v. Jewell*, 10 R. 887; and see *Harris v. Anderson*, 3 R. 237; see note 1, sec. 489.

(6) **Creditor of joint owner** can not have whole of land sold because it can not be divided. *Hill v. Cornwall*, 95 Ky. 512.

(7) **Decree necessary.** Infants' real estate can only be sold and conveyed in the manner pointed out in the Code. Where a father who was life tenant, his children owning the remainder, sold the land, a court of chancery had no power to confirm the sale. *Bill v. Burgess*, 15 R. 41; see note 2, sec. 489.

(8) **Indivisible real estate** may be sold upon allegation and proof that the interest of the infants will be benefited without reference to any other provision of the Code or necessity of the infants. *Bacon v. Bills*, 6 R. 217; all that is necessary to show is, that property is owned jointly and in possession, is a vested estate and can not be divided without materially impairing its value. *Burns v. Ingersoll*, 6 R. 741.

1. If the share of each owner be worth less than one hundred dollars.

2. If the estate be in possession and the property can not be divided without materially impairing its value, or the value of the plaintiff's interest therein.

491. Reversion or remainder may be sold. In an equitable action by the

(9) **Infants may sue as plaintiffs** by their statutory guardian, and no defense is required to be made for them, nor is bond required when the proceeds are to be invested under order of court. *Power v. Power*, 12 R. 793; *Bacon v. Bills*, 6 R. 217; *Henning v. Barringer*, 10 R. 674.

(10) **Joint tenants—tenants in common.** Joint tenants, tenants in common and coparceners are entitled to have a division of their real estate as contemplated by this section, and a sale of it can not be prevented by the objection of one of the joint owners when the property can not be divided without materially impairing the value. Subsec. 7, sec. 494, only applies when the property can be divided. *Kean v. Tilford*, 81 Ky. 600.

(11) **Jurisdiction.** Although an action for the division of land and allotment of dower may be pending in one county, a separate action for the sale of land under subsection 2 of this section may be brought in another county and land situated there sold. *Danforth v. Moss*, 90 Ky. 246.

(12) **Land must be in possession.** Where a wife died the owner of land in which her husband had an interest as tenant by the curtesy, a sale of the land could not be decreed under this section on petition of the father against the children. *Malone v. Conn*, 95 Ky. 93.

(13) **Life tenant and remaindermen.** Land owned jointly by a person and the children of another person, the interest of the children being subject to the dower right of their mother, may be sold under this section if indivisible. *Power v. Power*, 12 R. 793.

(14) **Lunatic.** Creditor may have estate of sold to pay debts. *German Bank v. Engeln*, 14 Bush 708.

(15) **Money to equalize.** In a suit for partition of land owned jointly by two or more persons, one of the joint owners

can not be compelled to accept his interest partly in money in order to equalize the division. *Wrenn v. Gibson*, 90 Ky. 189.

(16) **Parties—mortgagee.** In an action to sell land because indivisible it is not necessary that a mortgagee who asks that his debt be paid out of the interest of one of the owners, shall make the children of the mortgagor parties, they being parties to original action. *Southwick v. Greuzenbach*, 12 R. 263.

(17) **Parties—sale of joint interest.** In an action by a guardian for the sale of his ward's real estate owned jointly with another, it is not necessary that the ward should be a party, and therefore where he is made a party it is not necessary that he should be served with process. *Howard v. Singleton*, 94 Ky. 336.

(18) **Purchase by guardian** indirectly of ward's land at decretal sale is constructively fraudulent. *Morrison v. Garrott*, 15 R. 305; and see *Faucett v. Faucett*, 1 Bush 511.

(19) **Service of process on infant—bond.** In an action under sec. 490 for the sale of real estate owned jointly with an infant, it is not necessary that the infant defendant be served with process if his guardian appears and answers; nor is it essential to the validity of the sale that before it is ordered the guardian should execute the bond required by sec. 493. *Shelby v. Harrison*, 84 Ky. 144.

(20) **Summons is not necessary** against a lunatic when his committee enters his appearance. *Finzer v. Nevin*, 13 R. 773.

(21) **Vested interest in real estate** whether held in joint tenancy, or by tenants in common or coparceners, if incapable of division may be sold. *Smith v. Upton*, 12 R. 27.

§ 491. (1) Unconstitutional. So much of sec. 491 "as authorizes the sale of real property upon the petition of the life

owner of a particular estate of freehold in possession, or by his guardian or committee, if he be an infant or of unsound mind, against the owner of the reversion or remainder, though he be an infant or of unsound mind, and against the owner of the particular estate, if he be an infant or of unsound mind; or, if the remainder be contingent, against the person, if in being, in whom it would have vested, if the contingency had happened before commencement of the action, though he be an infant or of unsound mind, and against the owner of the particular estate, if he be an infant or of unsound mind—real property may be sold for investment of the proceeds in other real property.

§ 492 [542] **Sales under sections 489, 491.** In the actions mentioned in subsections three, four and five of section four hundred and eighty-nine and in section four hundred and ninety-one—

1 [§ 544] No sale shall be ordered if forbidden by the deed, will or contract under which the property is held.

2. The title papers, or copies of them, under which the property is held, must be filed with the petition.

3 [§ 542] The wife and children, if any, of the person of unsound mind must be made defendants to the action.

tenant in opposition to the wishes of the owner of the fee, where the latter is not laboring under the disability of infancy or of unsound mind, is unconstitutional."

✓ *Gossom v. McFerran*, 79 Ky. 236; but sale may be ordered if all parties in interest consent. *Robinson v. Fidelity Trust Co.*, 11 R. 313; and see *Harris v. Anderson*, 3 R. 237.

(2) **Decree is necessary** to pass title to real estate of infants; it can not be sold or conveyed in any other manner than as provided in the Code. *Bill v. Burgess*, 15 R. 41.

(3) **Proceeds of sale** under this section may be applied to the education and maintenance of the infant if necessary for that purpose. *Sanger v. Guscuth*, 3 R. 592.

(4) **Wife's land—sale of.** Husband and wife brought an action against their infant children asking for the sale of two tracts of land, in which it was alleged the wife owned a life estate and the children the remainder; it appeared that the wife owned the fee in one of the tracts, and it was held that the sale under the

judgment did not pass the wife's title in the tract in which she owned the fee, but did as to the other. *Munnell v. Orear*, 84 Ky. 452.

§ 492. (1) **Sale forbidden by deed.** Subsection 1 of this section, providing that no sale shall be ordered if forbidden by the deed or will, has reference to sales of infant's real estate on the petition of the guardian or committee, and was not intended to be applied to sales of real estate held jointly, when the property so held can not be divided without materially impairing its value or the plaintiff's interest therein; and in such cases the property may be sold although the sale of the interest of one of the joint owners is forbidden by the deed. *Kean v. Tilford*, 81 Ky. 600; *Warfield v. English*, 11 R. 263.

(2) The provisions of this section inhibiting a sale if forbidden by the deed are mandatory and must be obeyed. *Moore v. Thompson*, 80 Ky. 424. See further, as to what provisions in a will do not forbid sale, *Lindemeier v. Lindemeier*, 91 Ky. 264; *McGraw v. Minor*, 12 R. 687.

4. Facts must be stated in the petition, and must be proved, showing that the sale will benefit the defendant; or, in the action mentioned in section four hundred and ninety-one, facts must be stated in the petition, and must be proved, showing that the sale will benefit the parties interested in the property. (*Evidence to be taken on interrogatories, sec. 574.*)

§ 493. **Bond to be executed—provision as to married women.** Subject to the provisions of sections four hundred and ninety-one, four hundred and ninety-six and four hundred and ninety-seven, and except the cases mentioned in subsections one and two of sections four hundred and eighty-nine.

1. *Bond—form of.* The guardian of each infant, the committee of each person of unsound mind, and the husband or next friend of each married woman, must, before the sale is ordered, execute a bond to the infant, infant married woman, or person of unsound mind, with at least two sureties, worth not less than double the value of the estate to be sold, in substance as follows: "We, _____ principal, and _____ sureties, bind ourselves to _____ that the said _____ as guardian (or committee or husband or next friend), will faithfully discharge all his duties as such, and will comply with the judgments and orders of the court in the action, and will account for, pay and deliver to the said _____ all money or property due or belonging to him (or her) when required."

2. *Court to approve.* The court shall indorse its approval on said bond, which shall be recorded with the order of sale, and certified by the clerk of said court, who shall deliver it to the clerk of the county court, and it shall, by him, be recorded and properly indexed.

3. *Sale void if not executed.* If the bond be not given, any order of sale, and any sale or conveyance made under such order, shall be absolutely void and of no effect.

4. *Privy examination of married woman.* In an action against an infant married woman, no order of sale shall be made until she file an answer consenting to the sale, and acknowledge it, on privy examination, before the court or the judge thereof, or a commissioner appointed by the court.

§ 493. (1) **Bond to be executed.** When the provisions of this chapter require it, bond must be executed by the guardian, with at least two sureties, and it is not a bond unless there are two sureties; and unless this is done the sale will be void. *Barnett v. Bull*, 81 Ky. 127; *Fritsch v. Klausning*, 11 R. 788.

(2) Trust company authorized so to do may by its president execute the bond, without surety. *Phalan v. Louisville Trust Co.*, 88 Ky. 24; *Johnson v. Johnson*, 88 Ky. 275.

(3) Where the object of the action, under sec. 490, is to sell the real estate and reinvest the proceeds, no bond is re-

5. *Funds held until reinvested.* In the case mentioned in section four hundred and ninety-one, the court ordering the sale shall, by its commissioner, retain the custody and control of the fund realized by the sale until the same is reinvested in real estate, or in such other property as the funds of persons under disability may be invested by authority of law, and the court shall order the money to be paid, by its commissioner, directly to the person from whom the purchase for reinvestment is made, and to no other person, and in which case no bond shall be required. (*Sec. as amended by act 1892; and see as to investment of trust funds, Ky. Stats., sec. 4706.*)

GENERAL PROVISIONS.

§ 494. **Concerning sales—proceeds of sales—parties.** 1. The court shall appoint a suitable person, as commissioner, to execute its judgment.

2. *No warranty of title.* The court shall cause the title of the property to be conveyed by a commissioner to the purchaser, without warranty.

3. *Deed to be acknowledged and approved.* The conveyance must be acknowledged before and approved by the court, and be certified by its clerk to the clerk of the county court for record.

4. *Investment of proceeds.* In the actions for investment authorized by section four hundred and eighty-nine, the court shall order the proceeds of sales to be invested, subject to its approval, in real estate in or out of this State, or in bonds of the United States or of this State, or in the stock of a bank of this State, subject to the same uses, trusts and limitations, as the estate sold was subject to.

5. *Preservation and disbursement of proceeds.* In the actions mentioned in subsections, three and four of section four hundred and

quired as the proceeds will be under the control of the court. *Powers v. Powers*, 12 R. 793; but see *Fritsch v. Klausing*, 11 R. 788.

(4) The execution of this bond does not release from liability the sureties in guardian's bond in county court, the sureties in both bonds are liable. *Elbert v. Jacoby*, 8 Bush 542.

§ 494. (1) **Appraisement not necessary.** In an action by a guardian to have infant's land sold, under chap. 63, art. 3,

Gen. Stat., it was held not necessary to have the land appraised, as the statute allowing redemption within one year only applied to sales made under judgments against debtors. *Woolridge v. Jacob*, 79 Ky. 250; and see *Southwick v. Greuzenbach*, 12 R. 263.

(2) **Duty of commissioner.** The commissioner has no power to change the time, or terms, or place of sale specified in the judgment. *Cofer v. Miller*, 7 Bush 545.

eighty-nine, the court shall make proper orders for the preservation and disbursement of the proceeds of the sale.

6. *Descent of proceeds.* If the owner of real estate which may have been sold under the provisions of this chapter die during infancy; or, being of unsound mind, die intestate; or, being an adult married woman, die without having received the proceeds of sale upon her written request, and upon privy examination as is authorized by this chapter, or without disposing in the manner authorized by law of the property in which the proceeds may have been invested, the person who would have been entitled to the property, if it had not been sold, shall be entitled to the proceeds, or to the property in which they may have been invested.

7. *Parties—sale as to some, division as to others.* All persons interested in the property must be made parties; and, if objection to the sale be made by a defendant having a joint interest, his share shall not be sold, but the property may be divided, and a sale of the shares of those desiring it may be ordered, if such division and sale can be made without materially impairing the value of the property or of the plaintiff's interest therein.

8. *Consent of trustee when necessary.* If a deed or will give to a trustee a discretionary power to sell the property, the court shall not have power to order a sale of it without the consent of the trustee.

§ 495. *Dower—sale of and compensation for.* If a woman have a vested or contingent right to dower in land ordered to be sold pursuant to the provisions of this chapter, the court, with her consent, to be taken upon privy examination if she be married and of sound mind, or without her consent if she be of unsound mind, may order a sale of the land free from her right; and shall provide for reasonable compensation to her out of the proceeds of sale, or that she shall have the same right in property purchased with the proceeds as she had in the property sold. (*As to the sale and conveyance of inchoate right of dower of married women who are lunatics, see Ky. Stat., sec. 2145. As to relinquishment of dower by wife of insane husband, see Ky. Stat., sec. 2146.*)

§ 496. *Bond when not required—sale if share worth less than \$100.* 1. In the action mentioned in subsection one of section four hundred and ninety, neither the bond nor the privy examination provided for in this chapter shall be required.

2. If the share of a joint owner be of less probable value than one hundred dollars, a sale of it may be ordered, though the owner of a share worth more than one hundred dollars may not consent to a sale.

§ 497 [542] Purchase money when to remain lien on land—payment of proceeds and interest. 1. In the action mentioned in subsection two of section four hundred and ninety, the share of an infant, or of a person of unsound mind, shall not be paid by the purchaser; but shall remain a lien on the land bearing interest until the infant become of age, or the person of unsound mind become of sound mind, or until the guardian of the infant, or the committee of the person of unsound mind, execute bond as is required by section four hundred and ninety-three.

2. The infant upon becoming of age, or the person of unsound mind upon becoming of sound mind, or the guardian or committee of the infant or person of unsound mind, upon executing bond, may receive the proceeds; but, if the infant be a married woman, the provisions of subsection six of section four hundred and ninety-four must be complied with.

3. The proceeds when received by a married woman shall be her separate property.

4. The court may permit the guardian or committee, without executing the bond above mentioned, or the married woman, though she be an infant, to receive the interest on the money until it is paid.

§ 498. Joinder of parties plaintiffs and defendants. Two or more persons, either of whom can bring the action mentioned in subsection five of section four hundred and eighty-nine, may join therein against defendants who jointly own the property mentioned in the petition.

[Trust estates with remainder—sale of—investment of proceeds—improvements—taxes—insurance. That when lands are held in trust by one person for the life of another, with remainder over to a class of persons, or to any person not ascertained or to be ascertained until the death of the person upon whose life such estate for life is made to depend, or with power on the part of such person for whose life such life estate is held by the trustee, to dispose by a last will and testament, or by an instrument in the nature of a last will and testament, it shall be competent for the circuit courts or courts of like jurisdiction in the county in which such land or a part thereof is situate, in an action to which all persons having a present or vested interest in such land are parties, to direct the trustee to either sell or mortgage such land; but

§ 497. Purchaser can require bond to be executed by guardian so that he may receive money. *Kendall v. Briggs*, 81 Ky. 119.

§ 498. Construction of act 1882. *Craig v. Wilcox*, 94 Ky. 484.

in all action it must be averred and proven to the court that such sale or mortgage would be beneficial to all the parties concerned, and facts showing such benefits must be alleged and proven. Any deed or mortgage executed under authority, or in pursuance of any judgment rendered in any such action, shall be held and construed and have the same effect as if executed by every person having a vested or contingent interest in or ownership of such land, and as if executed by all persons and classes who could take under the limitations or provisions of said deed, or as devisees under the exercise of such power to devise or appoint, and as if every claimant, present or future, under such deed or power, was under no disability whatever. The proceeds of the sales authorized by this section shall be paid into court, and shall be reinvested by the court after first having, by appropriate order, provided for the payment of the costs and taxes, if any, in other property to be conveyed and held subject to the same limitations and trusts as the land sold was held. The proceeds of all mortgages of such lands as are mentioned in this section shall be paid into court, and shall be appropriated under the order of the court in the construction of permanent improvements on the land mortgaged. But before appropriating such money in the construction of such improvements, the court shall provide for the payment of all unpaid taxes on said land, and the costs of the action. The court shall require the life-tenant, out of the rents, to pay the taxes and insurance on such improvements, and residue of the rents to be paid into court for disposition by the court until such mortgage debt is fully paid off; and such court may provide for semi-annual reports to be made by such life-tenant; and in the event of the disobedience of any order of such court by such life-tenant, it shall be the duty of the court to appoint a receiver, who shall take possession of such land and hold the same as the court may direct, and collect and receive all the rents and profits of such land, and pay the same into court for such disposition thereof as the court may take.] (*Words in brackets acts of 1882.*)

CHAPTER XV.

DIVISION OF LAND AND ALLOTMENT OF DOWER.

- § 499. 1. Circuit or county court has jurisdiction—parties—practice.
 2. Persons under disability—provision as to.
 3. Division or allotment—when court may order.
 4. Three commissioners to be appointed—oath of.
 5. Time and place of meeting of commissioners.
 6. Duty of commissioners—report—practice.
 7. Deeds to be made if report confirmed.
 8. Report and deeds to be recorded.
 9. Two commissioners may act.
 10. Allegations of petition may be contested—trial by court.
 11. Removal of case from county to circuit court.
 12. Appeal may be taken.
 13. Costs—how apportioned.
 14. Verification of pleadings not required.
 15. Compensation of commissioners—taxed as costs.
 16. Jurisdiction of courts of equity not affected.
- 499a. Partition of land between life-tenants and their descendants.

§ 499 [546 to 556] **Circuit or county court has jurisdiction—parties—practice.** 1. A person desiring a division of land held jointly with others, or an allotment of dower, may file in the circuit court or county court of the county in which the land or the greater part thereof lies a petition containing a description of the land, a statement of the names of those having an interest in it, and the amount of such interest, with a prayer for the division or allotment; and, thereupon, all persons interested in the property who have not united in the petition shall be summoned to answer on the first day of the next term of the court. The written evidences of the title to the land, or copies thereof, if there be any, must be filed with the petition.

§ 499. (1) **Allotment of dower.** “By proceeding to have dower assigned and not insisting upon the allotment of homestead, appellant waived her right to homestead.” *Burch v. Atchinson*, 82 Ky. 585; and see further, as to dower, Ky. Stat., sec. 2132.

(2) A widow is not entitled to dower unless her husband was beneficially seized of the land during coverture. *Fontaine v. Dunlap*, 82 Ky. 321; 18 B. M. 107. See further, *Fritz v. Tudor*, 1 Bush 28; *Morgan v. Conn*, 3 Bush 58, and Ky. Stat., sec. 2132 and notes.

(3) **Appeals.** In *Davidson v. Davidson*, 1 R. 340, it was held that where the appeal was taken under Meyer's Code (Code of 1854) to the circuit court, in a proceeding for the division of land, that the circuit court had no right to try the case *de novo*, but should have affirmed or reversed the judgment of county court. This Code does not in terms authorize an appeal to the circuit court.

(4) **Commissioner's report** where the evidence is conflicting will be sustained, unless it appears that they have made a decided error. *Chamberlain v. Bal-*

2. Persons under disability—provision as to. The statutory guardian of an infant, committee of a person of unsound mind, and husband of a married woman, may file or unite in the petition, in the names of, and in conjunction with, such infant, person of unsound mind, or married woman; and, if the petition be against an infant, person of unsound mind, or married woman, the guardian, committee or husband may appear and defend for them; if they fail to do so, the court shall appoint a discreet person for that purpose.

3. Division or allotment—when court may order. Upon such a petition by all interested in the property; or upon the service of a summons on all who have an interest in the property and have not united in the petition, ten days before the commencement of the term, the court may order the division, or allotment of dower, according to the rights of the parties.

4. Three commissioners to be appointed—oath of. The court shall appoint three competent persons to make the partition, or allotment of dower, or both, having a due regard to the rights of all parties interested. Before proceeding to act, the commissioners shall take an oath to discharge their duty impartially.

linger, 11 R. 966; *McClanahan v. McClanahan*, 12 R. 440, and see note 21.

(5) **Costs—apportionment of.** See *Williamson v. Williamson*, 1 Met. 303; Ky. Stat., secs. 489, 2080.

(6) **Division of land—rights of parties.** It is proper to order the commissioners to so lay off the share of one, as to adjoin other land owned by him, if no detriment would be done to the others; and to lay the parcels of each in different tracts as near together as may be done without doing injustice to the others. *Gaithers v. Brown*, 7 B. M. 90; *Graham v. Graham*, 8 Bush 334.

(7) **Dower.** For tables estimating the value of potential right of dower, see *Lancaster v. Lancaster*, 78 Ky. 198; and value of present right of dower, see *Alexander v. Bradley*, 3 Bush 667; 3 Bush 216; see Ky. Stat., sec. 2132, and notes thereto.

(8) **Indivisible land.** Although land may be indivisible as a whole, yet if the interest of one of the owners can be set apart to him without injury to the interest of the other owners, it should be done. *Conner v. Cox*, 15 R. 140.

(9) **Infants—practice.** Where land in which infants have an interest is divided without making them parties, afterward upon being brought before the court their guardian may adopt the report of division theretofore made if it is fair. *Ky. Union Land Co. v. Elliott*, 12 R. 812.

(10) **Jurisdiction—equitable defense.** In an action for the division of land and allotment of dower the court may divide lands or allot dower in lands lying in other counties. *Danforth v. Moss*, 90 Ky. 246.

(11) In action to have land divided the county judge has the power to hear and determine any equitable defense that may be pleaded against a division. *Hopkins v. Crouch*, 86 Ky. 281.

(12) **Limitation.** An action to recover dower is barred after fifteen years from the time when the cause of action accrued. *Anderson v. Sterritt*, 79 Ky. 499.

(13) **Money to equalize.** In the division of land between coparceners the payment of money may be permitted to equalize an allotment if the money can be paid out of a common fund to be dis-

5. Time and place of meeting of commissioners. The order of appointment shall fix a time and place for the meeting of the commissioners, who shall meet accordingly; but, if prevented from meeting at the time and place so fixed, they may meet as soon thereafter as convenient; and may adjourn to such other time and place as they may agree upon, until their duty shall be performed.

6. Duty of commissioners—report—practice. They shall survey and allot to the parties their respective interests in the land, and make report thereof to the court; which may either confirm, set aside, or remand the report to the commissioners for correction.

7. Deeds to be made if report confirmed. If the report be confirmed, a commissioner to be appointed for the purpose shall, by deed, convey to each party the land allotted to him.

8. Report and deeds to be recorded. Said report and deed shall be recorded in the clerk's office of the county court, in proper books to be kept for that purpose; and, if the report be confirmed by the circuit court, it and the deed shall be certified by the clerk of that court to the clerk of the county court, for record.

9. Two commissioners may act. Two of the commissioners may act, if one refuse or fail to do so.

10. Allegations of petition may be contested—trial by court. A party summoned may, by answer, controvert the allegations of the petition or contest the rights claimed therein; and, thereupon, the case shall be tried and decided as an ordinary action, but without the intervention of a jury.

tributed between the heirs. 90 Ky. 189; but in other cases if the payment of money is necessary to equalize the allotment the land should be sold and not partitioned. *Wrenn v. Gibson*, 90 Ky. 189.

(14) **Oath of commissioners.** Where commissioners verbally agreed upon their report before being sworn, but afterward took the required oath and made the same report as that agreed upon, an objection that they were not sworn is not well taken. *McClanahan v. McClanahan*, 12 R. 440.

(15) **Parties.** The persons owning an interest in the land under the same title are the only persons necessary to be made parties. It is not necessary to make those claiming an adverse interest parties. *McIntire v. McIntire*, 82 Ky. 502.

(16) **Payment of money to equalize.** In a suit for division between tenants in common or joint owners, one of the joint owners can not be compelled to accept his interest partly in money and partly in land. *Wrenn v. Gibson*, 90 Ky. 189.

(17) **Rents.** In *Bridgford v. Barbour*, 80 Ky. 529, it was held that where one of the heirs who was also executor collected rents, the amount so collected was a charge on his portion of the estate.

(18) One tenant in common or joint tenant has not a lien on the interest of his co-tenant for the payment of the value of the rent received by the latter before partition of the land. Such rent is only a personal claim. *Burch v. Burch*, 82 Ky. 622.

(19) In an action to have dower allotted, rents can be recovered from the institution of the suit; and if the

11. **Removal of case from county to circuit court.** If the action be pending in the county court when such answer is filed, it may be removed, on motion of either party, to the circuit court, for trial; and the clerk shall, thereupon, deliver the papers pertaining to the case to the clerk of the circuit court.

12. **Appeal may be taken.** An appeal may be taken to the Court of Appeals from a final judgment, whether rendered by the circuit court or county court.

13. **Costs—how apportioned.** The costs of the action shall be apportioned among the parties in the ratio of their interests, except that the costs arising from a contest of fact or law shall be adjudged against the unsuccessful party.

14. **Verification of pleadings not required.** No verification of the pleadings shall be required.

15. **Compensation of commissioners—taxed as costs.** The commissioners shall be paid a reasonable compensation, to be taxed as costs.

16. **Jurisdiction of courts of equity not affected.** This section does not affect the jurisdiction of courts of equity to make partition or allot dower.

§ 499a. **Partition of land between life tenants and their descendants.** That where land is held under deed or will vesting a life estate in two or more persons or in trust for their benefit, with remainder as to the share of each to his or her children or descendants, it shall be lawful for a court of equity, on the petition of one of such life tenants and his or her children or descendants who would then be entitled to such remainder, all persons having interests in such lands being made parties, to partition such land so as to set apart to such life tenants and children or descendants so much of said land to which they shall

plaintiff die her administrator can recover rent for the same time. *Magruder v. Smith*, 79 Ky. 512; *Yancy v. Smith*, 2 Met. 408.

(20) The widow is entitled to one-third of the rents and profits of her husband's dowerable estate from his death until dower is assigned her as against a vendor's lien for the purchase money. *Wilson v. Ewing*, 79 Ky. 549; but is not entitled to dower as against the vendor's lien. *Lee v. James*, 81 Ky. 443.

(21) **Report of commissioners** appointed to make partition is subject to exception only upon the ground that they departed from or disregarded the judgment. *Beatty v. Beatty*, 10 R. 72, and see note 4.

(18)

(22) **Verification of pleadings** not required. *Hall v. Snipes*, 10 R. 435; subsection 14.

(23) **Warranty—limitation.** The implied warranty of title which arises from a partition of land between joint devisees survives to an heir of one of them, but such implied warranty does not run with the land so as to give a right of action to a vendee of one of the parceners. *Jones v. Bigstaff*, 95 Ky. 395.

(24) The statute of limitation does not begin to run against a partitioner or his heir for contribution until there has been an actual loss of land by superior title. 95 Ky. 395.

be entitled in severalty; and to that alone shall attach the title or interest of after-born children or descendants in whom, by the terms of said deed or will, such remainder would vest.

2. Where part of the land so held shall be situated in this State and part in another State, the court may, in making partition, take into consideration the value of all of said land, and set apart to those resident in this State land in this State equal to their full share of all of said land, securing, by proper deeds and orders to the non-residents, release of the interest of such residents in the lands in the other State or Territory. (*Act 1886.*)

TITLE XI.

REVIVOR OF ACTIONS.

- § 500. Unnecessary when—judgment without—order of.
- § 501. Order of may be on motion or by action.
- § 502. Consent revivor—service of order—when action revived.
- § 503. Revivor after notice.
- § 504. Non-resident—revivor against.
- § 505. Real representatives—revivor against.
- § 506. Real representatives—revivor against.
- § 507. Six months must elapse unless by consent.
- § 508. One year in which to revive against defendant.
- § 509. Plaintiff may revive at once—limitation one year.
- § 510. Action to be dismissed if time expired.
- § 511. Dismissal for failure to revive—notice.
- § 512. Trial not postponed if action revived.

§ 500 [557 to 565] **Unnecessary when—judgment without—order of.** Upon the death of a party to an action, or the cessation of his power as a personal representative or other fiduciary—

§ 500. (1) **Meaning of survives.** It was held under the Code of 1854 that the word "survives," used in sec. 557 (sec. 500 of this Code), "is used in its technical sense, and only applies to cases in which the right survives by operation of law, or operation of the will of contract under which the parties claim or are charged." *Smith v. Ferguson*, 3 Met. 424.

(2) **Order reviving not final** and no appeal can be taken therefrom. If the order is improper the court can review its action when a final judgment is rendered. *Reeves v. Davis*, 6 R. 514.

(3) **Parties.** An order of revivor should be served on the owner of the legal title to land ordered to be sold in the lifetime of the intestate, and where a sale is made, but has not been reported or confirmed, the action should be revived in the name of the personal representative and heirs. *Murphy v. Fryer*, 1 R. 348.

(4) **Practice.** In an action to recover land, the defendant died, leaving infant children. The order of revivor was served on those over and under fourteen years of age. As to the latter, the service was void. *Cox v. Story*, 80 Ky. 64.

1. If the right of action survive to or against the remaining parties, the action may proceed, without revivor, after statement, on the record, of such death or cessation of power.

2. Though the right of action do not survive to or against the remaining parties, the court may render judgment, as between them, if it can do so without prejudice to others.

3. If the right of action survive or pass to or against a person who is not a party to the action; or pass, otherwise than by survivorship, to or against a person who is a party to the action, the action may be revived, by an order of the court, for or against such person. (*How judgments revived, secs. 401 to 408; provisions of this title apply to cases in Court of Appeals, sec. 767.*)

§ 501 ⁽⁵⁰¹⁾ **Order may be on motion or by action.** The order may be made on the motion of any party to the action, or of his representative or

(5) The plaintiff having died, an order was made reviving the action in the name of his administrators and heirs; but there was no service of the order on defendant, and the record did not show on whose motion the action was revived. It could not be presumed that the order of revivor was made on motion of defendant, and a judgment for the plaintiff was held to be void. *Amyx v. Smith*, 1 Met. 529.

(6) The death of defendant being suggested and the action continued for revivor, at the next term, without a formal revivor, his executrix filed answer. On a second appeal by the plaintiff from a judgment against him, it was held too late to question her right to defend. *Moss v. Rowland*, 3 Bush 505.

(7) When a plaintiff dies pending his suit, his death may be pleaded in abatement; but the defendant may waive such plea, and permit the cause to be tried upon its merits, without revivor. The death of a plaintiff after judgment in the Circuit Court and before the appeal was prosecuted did not take from the Court of Appeals the right to entertain the appeal prosecuted in the name of the dead plaintiff, and the judgment of reversal was not void. *Spalding v. Wathen*, 7 Bush 659; and see *Hopkins v. Hopkins*, 91 Ky. 310.

(8) The death of the appellee after judgment and before the time allowed in

which to file a bill of exceptions will not prejudice the appellant, if his bill be tendered within the time allowed, although there has been no revivor. *Hayden v. Ortkeis*, 83 Ky. 396.

(9) It was agreed between counsel that the action should be revived against the administrator, but the agreement was not entered of record, and on an appeal the administrator had the action dismissed because there was no revivor. The proper practice in such case would be to have applied in proper time to the circuit court and have the order of revivor entered and the defect in the record supplied. *Williams v. Thompson*, 80 Ky. 325.

(10) **Purchaser at judicial sale** dies before sale is confirmed, the sale can neither be confirmed nor set aside unless the heirs of the purchaser are before the court. *Gardner v. Roberts*, 4 R. 614.

(11) **Revivor in Court of Appeals** dispenses with necessity for revivor in lower court upon return of case. *Howell v. Smith*, 7 R. 305; see sec. 767; and *Thompson v. Williams*, 86 Ky. 15, which holds that a personal representative by making a motion to dismiss an appeal does not enter his appearance so as to dispense with service of the order of revivor in lower court.

§ 501. (1) **Revivor — by pleading.** The fact that a person had not been appointed administrator at the time a petition

successor, suggesting the death or cessation of power, which with the name and capacity of the representative or successor shall be stated in the order. Or any party to the action, or his representative or successor, may file in the action a petition against the other parties, stating facts necessary to authorize a revivor, with a prayer therefor, upon which summons may be issued and served, or a warning order may be made under like restrictions and with the like effect as if issued or made upon original petition. (*Sec. as amended by act 1894.*)

§ 502 [555] **Consent revivor—service of order—when action revived.** If the order be made by consent of the parties, the action shall forthwith stand revived; and, if not made by consent, the order shall be served, in the same manner as a summons, upon the party adverse to the one making a motion. And, at the first term commencing not less than ten days after such service, the party upon whom it is made may show cause against the revivor; and, if sufficient cause be not then shown, the action shall stand revived.

§ 503 [555] **Revivor after notice.** If ten days' notice have been given to the representative or successor of the party who died, or whose powers ceased, of the motion by the adverse party for an order to revive the action in his name; or to the adverse party, if the motion be by such representative or successor; and due return be made of the service of the notice, the court may, if sufficient cause be not shown to the contrary, make an order reviving the action in the name of such party; whereupon, the action shall stand revived. (*Who is "successor," sec. 732-20.*)

§ 504 [555] **Non-resident—revivor against.** If it be shown by the affidavit of the person applying for an order of revivor, that the person against whom it is asked is a non-resident of this State; or has been absent from it four months; or has left it to avoid the service of the order; or so conceals himself that it can not be served upon him; or that his name and place of residence are unknown to the affiant, the court may make an order warning him to appear on the first day of its next term, commencing not less than sixty days after the making of the order; and the action shall then stand revived against such person, unless sufficient cause be shown to the contrary.

asking revivor was filed in his name as such is immaterial if he was afterward appointed and qualified and the defendant entered his appearance to the petition. *Fishback v. Green*, 87 Ky. 107.

(2) Although an amended pleading asking revivor is filed in vacation, if no objection is made on this ground when case is heard, this court will treat it as part of the record and hold the revivor in time. *Hall v. Snipes*, 10 R. 435.

§ 505 ⁽⁵⁰⁵⁾ **Real representatives—revivor against.** If a year elapse after the death of a defendant, and no person qualify as his personal representative, the action may be revived against his real representatives or any of them. (*Who is "real representative,"* sec. 732-18.)

§ 506 ⁽⁵⁰⁶⁾ **Real representatives—revivor against.** Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his real representatives or any of them, and an order therefor may be forthwith made in the manner directed in the preceding sections of this title.

§ 507 ⁽⁵⁰⁷⁾ **Six months must elapse unless by consent.** An order to revive an action against the personal representative of a defendant, or against him and the real representatives of the defendant, can not be made, unless by consent, within six months after the qualification of the personal representative.

§ 508 ⁽⁵⁰⁸⁾ **One year in which to revive against defendant.** An order to revive an action against the representative or successor of a defendant shall not be made, without his consent, unless within one year after the time when it could have been first made.

§ 509 ⁽⁵⁰⁹⁾ **Plaintiff may revive at once—limitation one year.** An order to revive an action in the name of the representative or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made; except that, if the

§ 505. **Heirs—revivor against.** Where a defendant dies pending an action, and no personal representative qualifies, the action may be revived against the heirs, but the remedy against the heirs being equitable, if the action is in ordinary, it should be transferred to equity. *Hagan v. Patterson*, 10 Bush 441.

§ 507. (1) **Against a vendee.** A suit by the vendor against the vendee to enforce a lien on land is not an action for the recovery of real property, and can not be revived as provided in sec. 506. It must be revived under sec. 507. *Buford v. Guthrie*, 14 Bush 677.

(2) **Limitation.** The death of the plaintiff abates the action, and if it is not revived within a year limitation will run from the death of the plaintiff. If a personal representative fail to revive, within a year after plaintiff's death, an action brought for the recovery of personal

property, the purchaser of such property, without notice of such suit, will not be affected by it. *Hull v. Deatly*, 7 Bush 687.

(3) **Order made within less than six months** from the qualification of the personal representative is a nullity unless made by consent, or unless the representative enters his appearance to it. *Thompson v. Williams*, 80 Ky. 15; but objection comes too late if made for first time in Court of Appeals. *Maupin v. Berkley*, 3 R. 617.

§ 508. **Order to revive** must be entered within twelve months, but it is not necessary that summons or notice be served within that time or action actually revived, but due diligence must be exercised in having service of order. *Thompson v. Williams*, 80 Ky. 15.

§ 509. (1) **Order to revive** in name of representative or successor may be made

defendant shall also have died, or his powers have ceased, in the meantime, the order of revivor on both sides may be made in the period limited in the last section.

§ 510 (571) **Action to be dismissed if time expired.** If it appear to the court, by affidavit, that either party to an action has been dead, or, if he sue or be sued as a personal representative, that his powers have ceased, for a period so long that the action can not be revived in the name of his representative or successor without the consent of both parties, it shall order the action to be stricken from the docket.

§ 511 (572) **Dismissal for failure to revive—notice.** At any term of the court succeeding the death of the plaintiff, whilst the action remains on the docket, the defendant, having given to the plaintiff's proper representatives, in whose names the action might be revived, ten days' notice of the application therefor, may have an order to strike the action from the docket, and for costs against the estate of the plaintiff, unless the action be forthwith revived.

§ 512 (573) **Trial not postponed if action revived.** When, by the provisions of the preceding sections, an action stands revived, the trial thereof shall not be postponed by reason of the revivor. (*Form of execution to be levied of assets in hands of administrator, page 639.*)

at any time within one year from the term of court at which order might first have been made; limitation begins to run from that time and not from death of plaintiff. *Horsley v. Asher*, 94 Ky. 314.

(2) After expiration of one year action can not be revived without consent

of the defendant except in the cases mentioned in last clause of this section. *B. & G. T. Co. v. Howell*, 13 R. 563; *Apperson v. Fulkerson*, 7 R. 452.

(3) Where an executor who is prosecuting an action dies, his personal representative can not have action revived in his name. 13 R. 563.

TITLE XII.

PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS.

- § 513. Court rendering, or Court of Appeals may.
- § 514. Court of Appeals, may for errors in record.
- § 515. Proceedings by appeal.
- § 516. Misprision not ground of appeal—until.
- § 517. Misprision defined.
- § 518. Modification or vacation of judgment after term.
- § 519. Misprision corrected by motion—time to make motion.
- § 520. Petition to vacate or modify judgment.
- § 521. Conditions on which judgment vacated.
- § 522. Grounds relied on to vacate to be first tried.
- § 523. Injunction pending proceedings.
- § 524. Premature judgment may be suspended.

§ 513 ⁽⁵¹⁴⁾ **Court rendering, or Court of Appeals may.** A judgment rendered in the circuit court may be reversed, vacated or modified, either by it or by the Court of Appeals. (*Judgment defined, sec. 368.*)

§ 514 ⁽⁵¹⁵⁾ **Court of Appeals may, for errors in record.** A judgment may be reversed or modified by the Court of Appeals for errors appearing in the record. (*Errors not regarded unless prejudicial, secs. 338, 756; how errors shown in record, secs. 333 to 340.*)

§ 515 ⁽⁵¹⁶⁾ **Proceedings by appeal.** The proceedings to obtain such reversal or modification shall be by appeal prosecuted as prescribed by law.

§ 516 ⁽⁵¹⁷⁾ **Misprision not ground for appeal—until.** A misprision of the clerk shall not be a ground for an appeal, until the same shall have been presented and acted upon in the circuit court. (*See also, sec. 763.*)

§ 517 ⁽⁵¹⁸⁾ **Misprision defined.** It shall be deemed a clerical misprision—

1. To render judgment before the action stood for trial pursuant to the provisions of this Code.

§ 513. **Judgment.** See notes to sec. 368.

§ 516. **Misprision not ground of appeal** until acted on in lower court. *Morrison v. Beckham*, 16 R. 294.

§ 517. (1) **Clerical misprision defined.** "The rule seems to be that whenever the error complained of is ascertained to consist in the mistake of the clerk and not in the judgment of the court, and there exists anything in the record by which it can be amended, the application should be made to amend in the court below, and, until thus made and

refused, such an error is not available for reversal in this court." *Dodds v. Combs*, 3 Met. 29.

(2) "A clerical misprision can only be shown by the record. This is proved by the familiar rule that a misprision can only be corrected by the record." *Bennett v. Tiernay*, 78 Ky. 580; *Boyd Co. v. Ross*, 95 Ky. 167.

(3) **Correction of.** Clerical misprision can not be corrected after the expiration of the term at which the judgment was rendered, except after notice to adverse

2. To render judgment against an infant—excepting married women—or persons of unsound mind, until a defense or report is filed pursuant to the provisions of section thirty-six, subsection three. (*When actions stand for trial, secs. 363, 364.*)

party and where court attempts to do so without notice the corrected judgment is void and no appeal lies from it until motion is made to set it aside. *Seiler v. Northern Bank*, 86 Ky. 128, and see notes to sec. 519.

(4) **Instances of misprision.** An error in the judgment as to the date from which interest is to be computed, *Clark v. Finnell*, 16 B. M. 329; *Johnson v. Bank*, 2 Duv. 521; *Wilson v. Barnes*, 13 B. M. 330; or to render judgment for protest fees not claimed in the petition, 16 B. M. 329, is a misprision.

(5) Where the petition admits the payment of a sum, and the credit is omitted in the judgment, it is a misprision. *Dodds v. Combs*, 3 Met. 29; *Hieronymous v. Mayhall*, 1 Bush 508; *Long v. Gains*, 4 Bush 353; *Bell v. Mansfield*, 12 R. 89. See *Tong v. Eifort*, 80 Ky. 152.

(6) In an action upon two notes failure to embrace one of them in a judgment by default. *Smith v. Mullins*, 3 Met. 182; or to give judgment in favor of A and B on a note alleged to have been sold by A to B, and asking judgment in B's favor alone. *Oldham v. Brannon*, 2 Met. 302; or where pending an action on a note in favor of A, an amended petition is filed setting up that the note has been assigned to B, and asking judgment in his favor alone, giving judgment in favor of A, is a clerical misprision. *Cooper v. Poston*, 1 Duv. 92.

(7) It is a misprision to render judgment before action stood for trial. *Webber v. Webber*, 1 Met. 18; or to give judgment upon an award not delivered to the parties ten days before the commencement of the term at which judgment is rendered. *Carson v. Carson*, 1 Met. 434; or upon constructive service prematurely. *Buckner v. Bush*, 1 Duv. 394; or to give judgment against some of the defendants before all the necessary parties are served with process. *Breeding v. Stamper*, 18 B. M. 175.

(8) It is misprision to render judgment against a defendant not summoned in the county where action is brought, before judgment is or can be rendered against a defendant summoned in the county. *Duckworth v. Lee*, 10 Bush 54; *Pottinger v. Mayfield*, 14 B. M. 647; or to render judgment by default where summons is executed in the county in which suit is brought not in time, and out of that county in time, on the service in the latter county, *Raymon v. Reed*, 16 B. M. 345; see *Ruby v. Grace*, 2 Duv. 540; or in an action against several, one of whom is a nominal and unnecessary party, to render judgment against the "defendants" without discrimination, *C., H. & D. R. R. Co. v. Spratt*, 2 Duv. 4; or to render judgment against infants before defense filed. *Morrison v. Beckham*, 16 R. 294.

(9) Mistake of clerk in entering amount of judgment may be corrected by motion. *Vissman v. Bryant*, 14 R. 874.

(10) **Limitation.** There is no limitation except such as pertains to the bringing of actions to a motion to correct a clerical misprision. *Lawless v. Sevier*, 5 R. 239; *Smith v. Mullins*, 3 Met. 182.

(11) **Not misprision.** Failure of the court to render judgment in conformity with the law, *Rogers v. Bradford*, 8 Bush 163; or to give judgment on an invalid bail bond, *Pauer v. Simon*, 6 Bush 514; or to render personal judgment against a defendant constructively summoned, *Payne v. Witherspoon*, 14 B. M. 270; is a judicial error; and see *Deshong v. Cain*, 1 Duv. 309.

(12) To render judgment against a defendant who has not been summoned, *Joyce v. O'Toole*, 6 Bush 81; *Long v. Montgomery*, 6 Bush 394 (the latter case overruling *Robinson v. Mobley*, 1 Bush 196); or who has been summoned out of the county in which the action is brought, *Ruby v. Grace*, 2 Duv. 540; *Dyas v. Lindsey*, 4 Bush 349; or against

§ 518 [570] **Modification or vacation of judgment after term.** The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it—

1. By granting a new trial for the cause and in the manner prescribed in section three hundred and forty-four.

an administrator without revivor, *Amyx v. Smith*, 1 Met. 529; is not misprision. The judgment is void. See sec. 763 and notes thereto.

(13) The rendition of a judgment before a defense by the guardian for the infant defendants is not misprision. *Pond v. Doneghy*, 18 B. M. 558.

(14) If the defendant object to a judgment on process not executed in time (*Raymon v. Reed*, 16 B. M. 345; *Hedger v. Downs*, 2 Met. 160), or moves for a continuance, which is improperly refused (*Mattingly v. Bosley*, 2 Met. 443; *Smith v. Ferguson*, 3 Met. 424), it is not misprision to overrule the objection or motion.

(15) Judgment for usurious interest prayed for in petition is not a clerical misprision; it is an appealable error. *Bunger v. Hart*, 3 R. 518.

(16) *Nunc pro tunc* orders can not be made unless there is something in record to amend by. *Boyd Co. v. Ross*, 95 Ky. 167.

(17) **Practice.** In cases of clerical misprision it is an inviolable rule that no amendment can be made unless there is something in the record to amend by. *Boyd Co. v. Ross*, 95 Ky. 167.

§ 518. (1) **Casualty—misfortune.** If the plaintiff or his attorney, before judgment, either directly or indirectly puts a party who is not liable for the debt sued on off of his guard, or prevents him from defending the action, such conduct will entitle the party to relief. *Hayden v. Moore*, 4 Bush 107. See further, notes 1-10, sec. 340.

(2) A petition to vacate a judgment alleged that plaintiff's failure to deny a material allegation in the answer, because of which defect judgment went against him, was the fault of his attorney, who drew the answer. Held that the petition did not present sufficient grounds for a new trial. *Phillips v. Skinner*, 6 Bush 662.

(3) The discovery of a defect in the title to land after judgment decreeing a specific performance is not sufficient cause to vacate the judgment, when the deed containing the defect was on record in the proper office, and could have been examined. *Denny v. Wickliffe*, 1 Met. 216.

(4) But if the index to the deed-book was lost, and after diligent search the deed could not be found, the party discovering the missing deed after judgment would be entitled to a rehearing. *Elliott v. Harris*, 81 Ky. 470.

(5) Where a judgment is rendered by default against a garnishee, he can not have it vacated on the ground that the note on which he owed the defendant the money garnisheed had been assigned by the defendant to another person before the judgment was rendered, and he was unable, after diligent inquiry, to learn that fact until after the judgment had been rendered. *Coburn v. Currens*, 1 Bush 242.

(6) Where his principal counsel was prevented from attending the court by sickness, the plaintiff was not entitled to have the judgment against him vacated on that ground, when he did not attend the trial or make an effort to provide other counsel. *Landrum v. Farmer*, 7 Bush 46. See *Yowell v. Gaines*, 2 Bush 211, and *Triplett v. Scott*, 5 Bush 81.

(7) A non-resident temporarily in this State was sued by several parties, and destroyed the copies of the summons served on him. Afterward he employed counsel and went to the clerk's office to look at the suits, but the clerk could not find one of them, and judgment in that case went against him by default. The defendant under the facts in the case was held entitled to a new trial. *McCall v. Hitchcock*, 9 Bush 66.

(8) That the defendant was of unsound mind (although not judicially found to

2. By a new trial granted in proceedings against defendants constructively summoned, as is prescribed in chapter one of title ten.

3. For misprisions of the clerk.

4. For fraud practiced by the successful party in obtaining the judgment.

5. For erroneous proceedings against a person under disability, except coverture, if the condition of such defendant do not appear in the record, nor the error in the proceedings.

be), and in consequence thereof incompetent to make an intelligent defense to the action, is such a misfortune within the meaning of sec. 579-7, Code of 1854 (same as sec. 518-7 of this Code), as will authorize the court to vacate or modify a judgment against him. *Bean v. Hoffendorfer*, 84 Ky. 685.

(9) See further, notes 1-10, sec. 340.

(10) **Clerical misprision**—see sec. 517 and notes thereto.

(11) **Common law judgment**—correction of in equity. See sec. 17 and notes thereto.

(12) **Death of party before appeal.** A judgment of the Court of Appeals reversing a judgment can not be disregarded because of the death of the appellant before the appeal is taken. His death after the judgment in the circuit court and before appeal was prosecuted did not take from the Court of Appeals the right to entertain the appeal. His death, if known, could have been taken advantage of as provided in this section and section 520. *Spalding v. Wathen*, 7 Bush 659.

(13) **Fraud.** Money collected under a judgment at law fraudulently obtained may be recovered back in equity without awarding a new trial of the ordinary action or setting aside the judgment therein. *Ellis v. Kelly*, 8 Bush 621.

(14) A cause once properly adjudged should never be reopened at the instance of one defendant on the ground of imputed omissions of his attorney and fraud of his codefendant. *Dillingham v. Mudd*, 1 Bush 102; and see *Baker v. Grundy*, 1 Duv. 281.

(15) As to setting aside judgment rendered by consent of an attorney who had

no authority to consent, see *Smith v. Dixon*, 3 Met. 438.

(16) The fact that there is neither allegation, exhibits nor proof to sustain the judgment does not authorize its vacation by the circuit court. *Anderson v. Anderson*, 18 B. M. 95.

(17) **Infants.** An infant defendant is entitled to a new trial under this section when the condition of the infant does not appear in the record, nor the error in the proceedings. *Jamison v. Petit*, 6 Bush 669.

(18) In an action to recover land, the defendant died, and the suit was revived against her children, some of whom were under fourteen. The order of revivor was served on those over, as well as those under, fourteen; the judgment as to the infants under fourteen was void, there being no proper service on them, and they could maintain an action to recover the land within twelve months after arriving at age. *Cox v. Story*, 80 Ky. 64.

(19) See further, notes to section 391; and *Richards v. Richards*, 10 Bush 617.

(20) **Judicial sales.** The power of the court to vacate an order confirming a judicial sale after the expiration of the term is not dependent upon the existence of a valid defense to the cause of action or claim sued on. The question as to the validity of the sale is distinct from that in regard to the judgment under which it is made, and there may exist grounds for setting aside a sale which do not affect the judgment. *Bean v. Hoffendorfer*, 84 Ky. 685.

(21) Judgment confirming a report of sale is a final judgment, which the court may vacate for the causes mentioned in this section. *Kincaid v. Tutt*, 88 Ky. 392.

6. For the death of one of the parties before the judgment in the action.

7. For unavoidable casualty or misfortune, preventing the party from appearing or defending.

8. For errors in a judgment, shown by an infant within twelve months after arriving at full age, as is prescribed in section three hundred and ninety-one. (*When ordinary judgment may be modified in equity, sec. 17.*)

(22) **Limitation.** There is no limitation except such as applies to the bringing of actions to a proceeding to vacate a judgment for fraud. *Lawless v. Sevier*, 5 R. 239.

(23) **Married women.** "The power existing under the Code of 1854 of courts in which judgments have been rendered to vacate or modify them after the expiration of the term, upon the ground that the defendant against whom erroneous proceedings were had was a married woman, has been taken away by the present Code, and now a defendant married woman is limited to the same remedies that persons not under disability are." And this change applies to judgments rendered while the Code of 1854 was in force. *Bagby v. Champ*, 83 Ky. 13.

(24) As a judgment against a married woman may be valid, in a proceeding to enforce such a judgment it should not be held conclusively to be void; but the defendant may show that it is void. *Parsons v. Spencer*, 83 Ky. 305; and see *Spencer v. Parsons*, 89 Ky. 577.

(25) A personal judgment can not be rendered against a married woman. *Agnew v. Williams*, 1 Bush 4; *Sweeney v. Smith*, 15 B. M. 325; but see now Ky. Stat., sec. 2128.

(26) **Motion for new trial** is not necessary by the party whose judgment has been set aside in an action for a new trial before he can appeal. *Reinicke v. Morse*, 10 R. 767.

(27) **New trial.** See secs. 340-344 and notes thereto for causes authorizing granting of new trial, and rules of practice relating thereto.

(28) **Non-residents** — vacation of judgments by; see sec. 414 and notes thereto.

(29) **Power of court over its judgments.** The court has no power to correct its judgment after the term, except for a clerical mispision. *Clark v. Anderson*, 13 Bush 111; but it may and should disregard its own order, if it is void. *Jones v. Com.*, 2 Duv. 81.

(30) The fact that there is no allegation in the petition, and no proof to uphold the judgment, is not one of the grounds for which a judgment can be vacated. The power of the court to vacate its judgments and award new trials after the term is confined strictly to the causes mentioned in this section. *Anderson v. Anderson*, 18 B. M. 95; *Hocker v. Gentry*, 3 Met. 463; *Scott v. Scott*, 9 Bush 174.

(31) **Right to new trial.** After expiration of term defendants who are summoned and failed to answer are not entitled to a new trial merely because of errors in judgment that would authorize its reversal. *Coffey v. Proctor*, 14 R. 415.

(32) The "successful party" does not necessarily mean the one in whose favor the judgment is rendered or who is entitled to enforce it, but applies as well to the defendant in the judgment. *Lawless v. Sevier*, 5 R. 239.

(33) **Vacation after appeal.** A judgment may be vacated for any of the causes mentioned in this section, even after an affirmance by the Court of Appeals, provided the error could not have been noticed by the Court of Appeals. In such cases the petition should not be filed until the mandate of the Appellate Court has been carried into effect. *McLean v. Nixon*, 18 B. M. 768; *Scott v. Scott*, 9 Bush 174; *Speak v. Mattingly*, 4 Bush 310.

(34) Judgment that has been affirmed by Court of Appeals, or entered in pur-

§ 519 [550] **Misprision corrected by motion—time to make motion.** The proceedings to correct misprisions of the clerk shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment because of its rendition before the action regularly stood for trial can not be made after the expiration of the first three days of the succeeding term.

§ 520 [551] **Petition to vacate or modify judgment.** The proceedings to vacate or modify the judgment on the grounds mentioned in subsections four, five, six, seven and eight, of section five hundred and eighteen, shall be by petition, verified by affidavit, setting forth the judgment, the grounds to vacate or modify it, and the defense to the action if the party applying was defendant. On the petition the proceedings shall be the same as those in the action in which the judgment was rendered.

§ 521 [552] **Conditions on which judgment vacated.** A judgment shall not be vacated on motion or petition, until it be adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seek its vacation, that there is a valid cause of action;

suance to its mandate, may be vacated in lower court, but not for errors that could have been corrected on the appeal. *Mad-dox v. Williams*, 87 Ky. 147.

(35) **Void judgment** may be resisted in any court, and not merely in court which rendered it. The provisions authorizing the modification and vacation of judgments apply where a judgment is erroneous, but need not be resorted to when judgment is void. *Stevens v. Deering*, 10 R. 393; *Spencer v. Parsons*, 89 Ky. 577.

§ 519. (1) **Misprision—how corrected.** A misprision can not be corrected by an action; the proper mode is by motion in the court rendering the judgment (*McCown v. Macklin*, 7 Bush 308); and notice should be given to all parties affected by the correction (*Oldham v. Brannon*, 2 Met. 302); and the application should be made in the court rendering the judgment, and if it refuses to make correction, an appeal may be taken. *Dodds v. Combs*, 3 Met. 29.

(2) There is no restriction or limitation as to the time in which a clerical misprision, except a premature judgment, shall be corrected. A misprision made in 1856 was corrected in 1859. *Smith v.*

Mullins, 3 Met. 182; *Lawless v. Seiver*, 5 R. 239.

(3) See further, note 3 to sec. 517.

(4) **Premature judgment.** Motion to correct must be made within the first three days of the succeeding term. *Wingfield v. Cotton*, 9 R. 275.

§ 520. (1) **Judgment — vacation of — appeal.** A judgment vacating a former judgment is final and may be appealed from; and after getting a new trial the defendant can not prosecute an appeal from the original judgment against him. *McCall v. Hitchcock*, 7 Bush 615; *McCall v. Hitchcock*, 9 Bush 66; *Pague v. O. & K. R. R.*, 1 R. 399. A judgment of the Court of Appeals can not be vacated by a bill filed in that court. *Beazley v. Mershon*, 6 Bush 424.

(2) **Petition to vacate judgment for fraud** should state the particulars and specify the manner in which judgment was obtained by fraud. *McCarty v. Payne*, 5 R. 242.

§ 521. **Practice.** It is not necessary to allege or prove a valid defense to the action before a new trial can be granted in an action where an issue had been formed by the pleadings. *Steel v. Seale*, 4 R. 42; and see *Layton v. Prewitt*, 15 R. 827.

and, if a judgment be modified, all liens and securities obtained under it shall be preserved to the modified judgment.

§ 522 ⁽⁵³³⁾ **Grounds relied on to vacate to be first tried.** The court may decide upon the grounds to vacate or modify a judgment before deciding upon the validity of the defense or cause of action.

§ 523 ⁽⁵³⁴⁾ **Injunction pending proceedings.** The party seeking to vacate or modify a judgment may obtain an injunction suspending proceedings on the whole or part thereof, upon its being rendered probable, by affidavit or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified. (*What court may grant injunction, sec. 285.*)

§ 524 ⁽⁵³⁵⁾ **Premature judgment may be suspended.** If the judgment was rendered before the action stood for trial, the suspension may be granted as provided in the last section, although no valid defense to the action is shown; and the court shall make such orders concerning the executions to be issued on the judgment, or on any replevy or forthcoming bond taken under it, as shall give to the defendant the same rights of delay that he would have had if the judgment had been rendered at the proper time

§ 523. (1) **Injunction pending motion to vacate.** In an action to vacate a judgment directing a sale of land the plaintiff did not obtain an injunction to suspend proceedings under the judgment; and neither the plaintiff in the judg-

ment sought to be enjoined nor the commissioner who made the sale were liable for any loss occasioned by the sale. *Brown v. Hudson*, 3 Bush 60.

(2) See further as to enjoining judgments, sec. 285 and notes thereto.

TITLE XIII.

EVIDENCE.

PART I. PRODUCTION OF EVIDENCE, 525.

II. COMPETENCY OF WITNESSES, 605.

III. PERPETUATION OF EVIDENCE, 610.

PART I.

PRODUCTION OF EVIDENCE.

CHAPTER I. BY WHOM TO BE PRODUCED, 525.

II. MEANS OF PRODUCTION, 528.

III. MODE OF TAKING TESTIMONY, 543.

CHAPTER I.

BY WHOM TO BE PRODUCED.

§ 525. Party holding affirmative must prove it.

§ 526. Burthen of proof—who has.

§ 527. Writings—when read as genuine.

§ 525 [525] **Party holding affirmative must prove it.** The party holding the affirmative of an issue must produce the evidence to prove it. (*And introduce evidence first, sec. 317.*)

§ 526 [526] **Burthen of proof—who has.** The burthen of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.

§ 526. (1) **Burden of proof.** See notes page 175.

(2) **Denial of ownership of note** sued on places burden of proving averment on defendant. *Vanbuskirk v. Levy*, 3 Met. 134.

(3) **Hirer of property.** In action against hirer of property to recover damages for injury to property while in his possession, burden is on defendant to account for injury. *Craig v. Lee*, 14 B. M. 119.

(4) **Legal presumptions.** That acceptor of bill had funds of drawer in his possession. *Turner v. Browder*, 5 Bush, 216; that party accepts deed which it is to his interest to accept. *Davenport v. Prewitt*, 9 B. M. 96; that officers perform their duties in the manner required by law. *Long v. Gains*, 4 Bush 353; *Webber v. Webber*, 1 Met. 18; *Lewis v. Quinker*, 2 Met. 284.

(5) The courts take judicial notice of the names and official signatures of all officers charged with the performance of public duties—as clerks, sheriffs, constables—and will presume that one who signs his name and follows it by words or letters indicating a particular official character is such officer. *Barret v. Godshaw*, 12 Bush 592.

(6) That a resident of this State who has been absent and unheard of for seven years is dead. *Ky. Stat.*, sec. 1639; *Bank v. Board of Trustees*, 83 Ky. 219; that person owning property in this State who has not been heard of for seven years and whose heirs are unknown died without heirs. *Ky. Stat.*, sec. 1609. That children are legitimate. *Dannelli v. Dannelli*, 4 Bush 51; *Goss v. Froman*, 89 Ky. 318.

(7) **Negligence—common carrier.** Where a passenger on a train is injured by an

§ 527 [533] **Writings—when read as genuine.** A writing purporting to have been made by a party, if referred to in and filed with a pleading of his adversary, may be read as genuine against him, unless he deny its genuineness by affidavit before the trial is begun. (*Party may file any writing as exhibit, sec. 128; what "writing" includes, sec. 732; how made part of the record, sec. 128.*)

CHAPTER II.

MEANS OF PRODUCTION.

- § 528. Subpœna defined—subpœna duces tecum.
- § 529. Clerk to issue on request of either party.
- § 530. Commissioner of court may issue.
- § 531. Officer authorized to take depositions may issue.
- § 532. Subpœna—how executed.
- § 533. Subpœna—who may execute—acknowledgment of.
- § 534. Witness—when not bound to appear in person.
- § 535. Witness may be punished for contempt.
- § 536. Witness—when liable for costs and damages.
- § 537. Warrant of arrest to compel attendance.

accident occurring to the train the legal presumption arises that the accident and consequent injury were caused by the negligence of the carrier. *L. & N. R. R. v. Ritter*, 85 Ky. 368.

(8) **Negligence.** Burden of proof is on party seeking to recover damages for injury caused by. *P. & M. R. R. v. Hoehl*, 12 Bush 41; and as to contributory negligence burden is on party relying on it as a defense. 12 Bush 41; *L. & N. R. R. v. Copas*, 95 Ky. 460.

(9) **Receipt** in full of amount due or in final settlement is *prima facie* evidence of payment, and burden is on party disputing its correctness. *Robinson v. Williamson*, 7 Bush 604.

(10) **Settlements of fiduciaries** with the county court are *prima facie* correct. Ky. Stat., sec. 1067.

(11) **Sound mind.** Every person is presumed to be of sound mind. *Hawkins v. Grimes*, 13 B. M. 257; *Flood v. Pragoff*, 79 Ky. 607.

§ 527. (1) **Writings filed as evidence.** A party is not confined in his evidence to such writings as he has relied on in his pleadings. The only benefit which a party derives from filing with his pleading writings relied on as evidence is, that, unless denied as provided in this section, they may be read as genuine. *Haney v. Tempest*, 3 Met. 96; *Barrett v. Coburn*, 3 Met. 511; *Wells v. Lewis*, 4 Met. 269.

(2) A paper referred to in a pleading and not with it, or otherwise filed so as to allow the adverse party an opportunity to inspect it before trial, can not be read without proof of its execution. *Gentry v. Doolin*, 1 Bush 1.

(3) The provisions of this section apply to defendants constructively summoned. *Buckner v. Bush*, 1 Duv. 394; and see note 1 to sec. 409.

(4) This section applies only to writings that have been executed by the

- § 538. Punishment imposed for contempt.
- § 539. Warrant of commitment or arrest.
- § 540. Prisoner produced for oral examination.
- § 541. Officer to retain control of prisoner.
- § 542. Witness can not be sued out of his county.

§ 528 [599] **Subpœna defined—subpœna duces tecum—court may direct issue of.** The process by which the attendance of a witness is required is a subpœna. It is a writ directed to the sheriff, requiring him to summon the person named therein to attend at a particular time and place, to testify as a witness. It may, when the court or the judge thereof so directs, require the witness to bring with him any book, writing or other thing, under his control, which he is bound by law to produce in evidence. (*Form of, page 643; when may issue on holiday, sec. 665.*)

§ 529 [600] **Clerk to issue on request of either party.** If the attendance of the witness be required before the court, or on the trial of an issue ordered by it, the subpœna shall be issued by the clerk on the request of either party.

§ 530. **Commissioner of court may issue.** If the attendance of a witness be required before a commissioner of the court, the subpœna shall be issued by the commissioner.

§ 531 [601] **Officer authorized to take depositions may issue.** If the attendance of the witness be required for the purpose of giving his deposition, the subpœna shall be issued by an officer authorized to take the deposition.

§ 532 [602] **Subpœna—how executed.** The service of a subpœna is made by showing the original and delivering a copy or a ticket containing the substance thereof to the witness.

§ 533 [603] **Subpœna—who may execute—acknowledgment of.** A subpœna may be served by any officer by whom a summons might be served, and his return thereon shall be proof of the service. It may also be served by any person of full age—whose affidavit indorsed thereon shall be proof of the service; or the witness may acknowledge service in writing on the subpœna. (*What officers may serve, sec. 667; may be served on holiday, sec. 665.*)

§ 534 [604] **Witness—when not bound to appear.** Subject to the provisions of section five hundred and fifty-six, a witness shall not be compelled to attend for examination upon the trial of a civil action, if he resides more than twenty miles from the place where the court sits in which the action is pending; nor to attend to give his deposition

party against whom it is proposed to read them. *Long v. Kerrigan*, 13 R. 483.

§ 528. **Books and papers—production of.** See notes to sec. 605, and *Marion Nat. Bank v. Abell*, 88 Ky. 428.

out of the county in which he resides, or in which the subpœna is served on him.

§ 535 [500] **Witness may be punished for contempt.** Disobedience of a subpœna; intentional evasion of a service of it, by concealment, or otherwise; concealment or removal of a minor to prevent service of a subpœna upon him, or preventing his attendance as a witness, by a person having control of him; or a refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required.

§ 536 [500] **Witness—when liable for costs and damages.** When a witness is brought before a court for contempt by disobedience of a subpœna, and it is shown that the legal fees for travel and one day's attendance were paid or tendered to him when the subpœna was served, and that he failed to attend without reasonable cause, the court may summarily order him to pay the party, on whose behalf he was summoned, the costs occasioned to him by the disobedience of the subpœna, not exceeding twenty dollars; and he shall also be liable for any damages occasioned by the failure to attend. (*Witness fees, see Ky. Stat., sec. 1734.*)

§ 537 [507] **Warrant of arrest to compel attendance.** If a witness fail to attend in obedience to a subpœna, the court or officer before whom his attendance was required may issue a warrant for arresting and bringing him before the court or officer, at a time and place to be fixed in the warrant, to give his testimony; and answer for the contempt. If the warrant be not for immediately bringing the witness before the court or officer, a sum shall be fixed in which the witness may give bond, with surety, for his appearance; and, if no sum be fixed by the court or officer, it shall be one hundred dollars. (*Form of warrant page 643.*)

§ 538 [500, 500] **Punishment imposed for contempt.** The punishment for the contempt mentioned in section five hundred and thirty-five shall be by fine, not exceeding thirty dollars, and imprisonment, not exceeding twenty-four hours; but an officer imposing such punishment shall promptly report his action, and the reasons therefor, to the court in which the action is pending; and the court may vacate or modify the order of the officer, and shall render judgment for the fine imposed by the officer, or so much thereof as is approved by the court. If a witness refuse to testify, or to be sworn, or to give a deposition, he shall be imprisoned so long as he refuses; and, if the court finally adjourns before he submits, he shall remain in prison until the next

term, or until he testifies before an officer who is authorized to take his testimony. The final disposition of the case in which he so refuses shall discharge him from imprisonment.

§ 539 [666] **Warrant of commitment or arrest.** Every warrant of commitment to prison issued by a court or officer, pursuant to this chapter, must specify particularly the cause of the commitment; and, if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness must be directed to the sheriff of the county where he may be, and be executed in the same manner as process from the court.

§ 540 [667] **Prisoner produced for oral examination.** A person confined in any jail, work-house or house of correction, in this State, may, by order of court, be required to be produced for oral examination in the county where he is confined; but in all other cases his testimony must be taken by deposition.

§ 541 [668] **Officer to retain control of prisoner.** While his deposition is being taken, he shall remain under the control of the officer having him in custody, who shall afford reasonable facilities for the taking of the deposition.

§ 542 [669] **Witness can not be sued out of his county.** A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning or attending, in obedience to a subpoena. (*And see further secs. 81, 666.*)

CHAPTER III.

MODE OF TAKING TESTIMONY.

- ARTICLE 1. AFFIDAVIT, 543.
2. DEPOSITION, 552.
3. GENERAL RULES OF EXAMINATION, 592.

ARTICLE 1.

AFFIDAVIT.

- § 543. Testimony—modes of taking.
§ 544. Affidavit defined.
§ 545. Deposition defined.
§ 546. Oral examination defined.
§ 547. Purposes for which affidavit may be used.
§ 548. Examination of person obtaining provisional remedy.
§ 549. Affidavit—before whom to be made.
§ 550. Affidavit—who may make.
§ 551. Affidavit—how made.

§ 543 [604] **Testimony—modes of taking.** The testimony of witnesses may be taken by affidavit, deposition or oral examination.

§ 544 [605] **Affidavit defined.** An affidavit is a written declaration, under oath, made without notice to the adverse party.

§ 545 [606] **Deposition defined.** A deposition is a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine; or, upon written interrogatories.

§ 546 [607] **Oral examination defined.** An oral examination is an examination in the presence of the tribunal which is to decide the fact or act upon it, the testimony being heard by the tribunal from the lips of the witness.

§ 547 [608] **Purposes for which affidavit may be used.** An affidavit may be read to verify a pleading; to prove the service of a summons, notice or other process in an action; to obtain a provisional remedy, an examination of a witness, a stay of proceedings or a warning order; or, upon a motion; and in any other case permitted by law.

§ 544. Affidavit must be subscribed by affiant and sworn to. *Simms v. Simms*, 88 Ky. 642; but it is not essential that the name of the affiant should appear in body of affidavit, it is sufficient if he describes himself as "the affiant." *Voorhels v. Eiting*, 15 R. 161; nor does omission of immaterial word in jurat invalidate it. *Clark v. Miller*, 88 Ky. 108.

§ 547. Affidavits—power of commissioner. The master in chancery has inherent power to take and report testimony concerning matters of fact referred to him by the court, and may examine witnesses on oath and certify their statements, not as depositions, but as facts constituting the basis of his report. *Taylor v. Young*, 2 Bush 426.

§ 548 ⁽⁶⁰⁹⁾ **Examination of person obtaining provisional remedy.** If a provisional remedy be granted upon an affidavit, and a motion be made to discharge or vacate it, the party making the motion may, by written notice to the adverse party, or by order or rule of court, require the production of the affiant for cross-examination; whereupon, the party notified shall produce the affiant, within ten days, before an officer authorized to take depositions, at a time and place of which he shall give the adverse party three days' notice. If the affiant be not produced, his affidavit shall be suppressed; and, if produced, he may be examined by either party.

§ 549 ⁽⁶¹⁰⁾ **Affidavit—before whom to be made.** An affidavit may be made—

1. In this State, before a judge of a court, a justice of the peace, notary public, examiner, clerk of a court or master-commissioner.

2. Out of this State, before any officer or person who may be authorized, pursuant to section five hundred and sixty-four, to take depositions.

§ 550 ⁽⁶¹¹⁾ **Affidavit—who may make.** 1. Any affidavit which this Code requires or authorizes a party to make may, unless otherwise expressed, be made by his agent or attorney, if he be absent from the county.

2. [If an action be brought by two or more plaintiffs, an affidavit for a warning order may be made by any one of them who may be in the county: *Provided*, That the affidavit shall state the affiant's belief that the other plaintiffs who reside in the county are also ignorant of such of the facts as are unknown to the affiant.]

3. Every other affidavit in behalf of two or more parties united in interest may, unless otherwise expressed, be made by one of them, subject, with reference to pleadings, to subsection four of section one hundred and seventeen.

4. No affidavit in behalf of two or more parties united in interest shall, unless otherwise expressed, be made by an agent or attorney, unless all of them be absent from the county.

5. The affidavit of an agent or attorney must state the absence from the county of the party or parties for whom it is made, and the fact that the affiant is agent or attorney. (*Words in brackets amendment of 1880.*)

§ 550. **Agent—affidavit of.** The statement in the affidavit of an agent that he *believes* the facts sworn to are true is sufficient. *Franklin Institution v. Bank of Wheeling*, 1 Met. 156; but the affidavit must state that the affiant is agent or at-

torney and that the principal is absent from the county, and if there be more than one, that all are absent. *Pool v. Webster*, 3 Met. 278; *Anderson v. Sutton*, 2 Duv. 480; 14 B. M. 517.

§ 551 [612] **Affidavit—how made.** Every affidavit shall be subscribed by the affiant; and the certificate of the officer or person before whom it is made shall be written separately, following the signature of the affiant, and shall be proof of the time and manner of the affidavit being made.

ARTICLE 2.

DEPOSITIONS.

- SUBDIVISION 1. **WHEN TO BE USED, 552.**
2. **OFFICERS AUTHORIZED TO TAKE, 559.**
3. **MANNER OF TAKING, 565.**
4. **EXCEPTIONS TO, 585.**
5. **DEPOSITIONS TO BE USED IN OTHER STATES, 591.**

SUBDIVISION 1.

WHEN TO BE USED.

- § 552. Depositions—when may be read as evidence.
§ 553. Retaking without leave except in rebuttal forbidden.
§ 554. Witnesses whose depositions may be read in any action.
§ 555. Witness whose deposition may be read not required to attend court.
§ 556. Witness—when court may compel attendance of.
§ 557. Depositions—when parties may begin taking.
§ 558. Deposition of witness *de bene esse*.

§ 552 [612] **Depositions—when may be read as evidence—proof of exhibits—oral testimony.** 1. Depositions or certified copies thereof, if they be lost, may be used upon the trial of any issue of fact in an equitable action, unless such issue be transferred pursuant to title two, and upon the trial of any issue in an ordinary action, if such issue be transferred pursuant to said title; and upon any motion, or upon a reference to a commissioner of any question, relating to such issue.

§ 551. Affidavit must be subscribed by affiant. *Sims v. Sims*, 88 Ky. 642; and see note to sec. 544.

§ 552. (1) **Oral proof on trial of issue in equity.** Oral testimony may be introduced on the trial by jury of an issue in an equitable action. *McMakin v. Stratton*, 82 Ky. 226; *Saving Bank v. Benton*, 2 Met. 240.

(2) **Practice.** Party taking deposition declines to read it upon the trial, it may

be read by the adverse party, but if it impeaches the character of a witness, who is not assailed on the trial, the party whose witness it attacks can not read it. *Sullivan v. Norris*, 8 Bush 519.

(3) If a party takes a deposition and declines to read it, the adverse party may read such deposition, although the witness would have been incompetent if offered by him. *Weil v. Silverstone*, 6 Bush 698; and see *Crabb v. Larkin*, 9 Bush 154.

2. Subject to the provisions of section seven hundred and eight, upon any issue of fact which arises upon the pleadings in an equitable action, unless such issue be transferred pursuant to title two, or upon the pleadings in an ordinary action, if such issue be transferred pursuant to said title, proof must be made by depositions or exhibits: *Provided*, That the genuineness of exhibits may be proved orally in court as heretofore allowed by law, and that the court may require oral testimony upon a trial by jury. (*Interrogatories may be read as deposition, secs. 140, 141, 146; when exhibits constitute part of record, sec. 128.*)

§ 553. **Retaking without leave except in rebuttal forbidden.** The deposition of a witness shall not be retaken without leave of the court [except in rebuttal]. (*Words in brackets, act 1886.*)

§ 554 ⁽⁶¹⁴⁾ **Witnesses whose deposition may be read in any action.** A deposition may be read upon the trial of an issue in any action, if, at the time of the trial, the witness reside twenty miles or more from the place where the court sits in which the action is pending; or be absent from this State; or be its Governor, secretary, register, auditor or treasurer; or a judge or clerk of a court; or a postmaster, or a president, cashier, teller or clerk of a bank; or a practicing physician, surgeon or lawyer; or a keeper, officer or guard of the penitentiary; or be dead; or be of unsound mind, having been of sound mind when his deposition was taken; or be prevented from attending the trial by infirmity or imprisonment; or be in the military service of the United States or of this State.

§ 555 ⁽⁶¹⁵⁾ **Witnesses—when bound to attend court.** A witness whose deposition might be used shall not be compelled to attend in court for oral examination, unless he failed, when duly summoned, to give his deposition. (*When deposition may be read, secs. 534, 554.*)

§ 556 ⁽⁶¹⁶⁾ **Witness—court may compel personal attendance.** Upon the affidavit of a party, and the written statement of his attorney, that the testimony of a witness is important, and that the just and proper effect of his testimony can not in a reasonable degree be obtained without an oral examination in court, the court may, at its discretion, order the personal attendance of the witness to be coerced, although such witness may otherwise be exempt from personal attendance by the provisions of this Code.

§ 553. **Party who retakes deposition** may, if he has obtained permission to retake, read both the depositions. *Deneal v. Allensworth*, 2 J. J. M. 446.

§ 554. **Depositions of witnesses** who re-

side within twenty miles of the place of trial are incompetent and should not be read on trial. *Couadeau v. American Accident Co.*, 95 Ky. 280; *Gregg v. Wood*, 3 R. 526.

§ 557 ⁽⁵¹⁷⁾ **Depositions—when parties may begin taking.** The plaintiff may commence taking depositions immediately after the service of the summons; and the defendant, immediately after filing his answer.

§ 558 ⁽⁵¹⁸⁾ **Depositions de bene esse.** A party may take the deposition of any witness *de bene esse*, and it may be used under the circumstances prescribed in section five hundred and fifty-four.

SUBDIVISION 2.

OFFICERS AUTHORIZED TO TAKE DEPOSITIONS.

§ 559. **Examiners to be appointed by circuit judges.**

§ 560. **Examiner's office at county seat.**

§ 561. **Oaths may be administered by.**

§ 562. **Depositions in State—who may take.**

§ 563. **Officer not required to leave office to take.**

§ 564. **Depositions out of State—who may take.**

§ 559 ⁽⁵¹⁹⁾ **Examiners to be appointed by circuit judges.** The circuit judges shall appoint two or more examiners in each county of their respective districts, who, before acting, shall be sworn in open court to discharge faithfully and impartially the duties of their office; and who shall hold their offices at the pleasure of the court. (*Fees of examiners, Ky. Stat., sec. 1741.*)

§ 560 ⁽⁵²⁰⁾ **Examiner's office at county seat.** An examiner's office shall be kept in or near the county seat; and, if there be more than one, the others at such place as the court may direct.

§ 561 ⁽⁵²¹⁾ **Oaths may be administered by.** Examiners may administer oaths and give certificates thereof in all cases in which justices of the peace may do so.

§ 562 ^(522 to 526) **Depositions in State—who may take.** Depositions taken in this State, to be used in its courts, shall be taken before an examiner, a judge or clerk of a court, a justice of the peace, or a notary public; and the laws relating to examiners shall apply to each of these officers.

§ 563 ⁽⁵²⁷⁾ **Officer not required to leave office to take.** It shall not be the duty of an officer to go out of his office to take depositions, but he may take them at any place in the county for which he is appointed.

§ 558. **Deposition can not be read unless it appears from proof offered at the trial that witness is unable to be present at trial although he may not have been able**

to attend when his deposition was taken. Gillespie v. Gillespie, 2 Bibb 89; Ails v. Sublit, 3 Bibb 204; and see Taylor v. Whiting, 4 Mon. 364.

§ 564 ⁽⁵²⁸⁾ **Depositions out of State—who may take.** Depositions may be taken, out of this State, before a commissioner appointed by the Governor thereof; or before any other person empowered by a commission directed to him by consent of the parties or by order of the court; or before a judge of a court, a justice of the peace, mayor of a city, or notary public.

SUBDIVISION 3.

MANNER OF TAKING DEPOSITIONS.

- § 565. Taken upon notice or interrogatories.
- § 566. Notice to take—requisites of.
- § 567. Reasonable notice—what deemed.
- § 568. Adjournment to another time and place.
- § 569. Adjournment to another place—cause for.
- § 570. Causes for adjournment to be proven.
- § 571. Interrogatories—when party may require taken on.
- § 572. Interrogatories—taken on by consent.
- § 573. Interrogatories—court may require taken on.
- § 574. Interrogatories—when must be taken on.
- § 575. Interrogatories—filing, caption, notice, duty of clerk.
- § 576. Commission to take on.
- § 577. Commission and interrogatories—duty of clerk.
- § 578. Subpœna for witnesses—officer may issue.
- § 579. Powers of officer taking.
- § 580. Statements of witness to be written.
- § 581. Party nor attorney allowed at taking.
- § 582. Certificate of officer—what it shall state.
- § 583. Transmission to clerk—duty of clerk.
- § 584. Fees of officers.

§ 565 ⁽⁵²⁹⁾ **Taken upon notice or interrogatories.** Depositions shall be taken upon reasonable notice to the adverse party or upon interrogatories.

§ 566 ⁽⁵³⁰⁾ **Notice to take—requisites of.** The notice must be in writing, signed by the party giving it, or his attorney; must be addressed to

§ 565. (1) **Notice to infants.** Depositions to be read against non-resident infants may be taken upon notice to the corresponding attorney appointed for them. *C. & L. R. R. Co. v. Bowler*, 9 Bush 468.

(2) **Walver.** Where a witness has been cross-examined, an objection for want of notice will be unavailing. *Talbot v. Pierce*, 14 B. M. 195; and so if adverse party is present when it is taken. *Talbot v. Bradford*, 2 Bibb 316.

§ 566. **Notice to take on a certain day,** and if not then taken, to be taken on a subsequent day, is good. *Moore v. Humphreys*, 2 J. J. M. 54.

(2) Notice was given in Lexington, Ky., that depositions would be taken at Natchez on the 15th of January, or if not then on the 16th, or if not then on the 17th, or if not then on the 18th, and on the 18th the deposition was taken and the notice held sufficient. *Thomas v Davis*, 7 B. M. 227.

the party on whom it is to be served, and specify the time and place of taking the deposition, and the action or proceeding in which it is to be used; and must also state the name of the proposed witness, if the deposition be taken out of the county where the court sits, unless it be taken to prove a law, custom or usage. (*Form of notice, page 644; how and by whom served, secs. 625, 624; on whom to be served, secs. 626 to 633.*)

§ 567 [333] **Reasonable notice—what deemed.** A notice shall be deemed reasonable that allows one day for each thirty miles which the party will have to travel and one day for preparation if the distance be less than one hundred miles, and two days if it be more. If the distance exceed fifty miles and the usual mode of travel for the whole or a part of the distance be by steamboat, railroad cars or other public conveyance, the time ordinarily required by such mode of travel, with the days given for preparation, shall be deemed sufficient in the notice. If the distance be less than thirty miles, a notice which gives to the party a reasonable opportunity to be present shall be sufficient.

§ 568 [333] **Adjournment to another time and place.** If a notice be given to take a deposition, and the attendance of the witness can not be procured at the place specified in the notice, owing to his infirmity or imprisonment, the taking of the deposition may be adjourned to the next day, and to some other convenient place; and a written notice of the adjournment shall be conspicuously posted, at the place specified in the notice, before noon of the day on which the deposition was to have been taken.

§ 569 [334] **Adjournment to another place—cause for.** If a notice be given to take a deposition, but from any cause not mentioned in the last section the deposition can not be taken at the place specified in the

(3) Only such certainty in notice as to place where deposition will be taken is required as will enable party by reasonable inquiry to ascertain place and attend taking. *Barbour v. Whitlock*, 4 Mon. 180; *Taylor v. Bate*, 4 Dana 198; *Crozler v. Gano*, 1 Bibb 257; *Overstreet v. Phillips*, 1 Litt. 120.

§ 567. (1) **Notice—what is reasonable.** Notice to take depositions at the same time that the adverse party is taking depositions in the same case is not sufficient, nor does it remove the objection that the party might have obtained leave to cross-examine, and thus have completed the depositions before the case was submitted. *Collins v. Richart*, 14 Bush 621.

(2) Party should be allowed a reasonable time to notify or find his attorney. *Greer v. Ludlow*, 7 R. 290.

§ 568. **Adjournment.** When a deposition is commenced too late in the day to finish it, and the witness can not attend the next day, other depositions may be taken the next day, and the deposition of the first witness finished on the next following day, proper notice of the adjournment being given. *Jarboe v. Colvin*, 4 Bush 70; and see *Price v. Caperton*, 1 Duv. 207, for statement of fact showing that an examiner properly adjourned the taking of a deposition to another time and place on account of inability of witness to attend.

notice, an adjournment to the nearest convenient place shall be made; and a written notice of the adjournment shall be conspicuously posted, at the place specified in the notice, for one hour before the deposition is commenced at the place to which the adjournment is made.

§ 570 ⁽⁶³⁵⁾ **Causes for adjourning to be proven.** 1. A deposition taken pursuant to section five hundred and sixty-eight shall be accompanied by the affidavit of the party taking it, or of his attorney, stating the cause of the non-attendance of the witness, and by the officer's certificate that notice of the adjournment was posted as is required by said section.

2. A deposition taken pursuant to section five hundred and sixty-nine shall be accompanied by the officer's certificate stating the cause of the adjournment and that notice thereof was posted as is required by said section.

§ 571 ⁽⁶³⁶⁾ **Interrogatories—when party may require taken on.** If more than three days' notice to take a deposition be required by section five hundred and sixty-seven, the party to whom the notice is given may, by notice to the adverse party or his attorney, served on the day when the first notice is given, or on the following day, require the deposition to be taken upon interrogatories.

§ 572 ⁽⁶³⁷⁾ **Interrogatories — taken on by consent.** Depositions may be taken upon interrogatories with the consent of parties who are free from disability; or the consent of the guardian, curator, committee or husband of a party who is under disability.

§ 573. **Interrogatories—court may require taken on.** The court, on motion of either party, may permit or require depositions to be taken upon interrogatories—

1. If the ascertainment of a fact or the stating of an account be referred to a commissioner.

2. If any of the parties against whom a deposition is to be read be defendants who may have been constructively summoned and have not appeared; or be under any disability other than coverture, or infancy and coverture combined.

3. If the parties against whom the deposition is to be read be numerous, and have not appointed an agent or attorney residing in this State known to the party taking the deposition.

§ 574. **Interrogatories—when must be taken on—exception.** If all of the parties against whom a deposition is to be read have been constructively summoned and have not appeared, or be defendants and under disability, other than coverture or infancy and coverture combined, the deposition must be taken upon interrogatories. [Except in

actions and proceedings for divorce and alimony and the custody of children when involved in such a suit.] (*Words in brackets added by act 1886.*)

§ 575 [633] **Filing and notice of—caption—duty of clerk.** 1. In the cases mentioned in sections five hundred and seventy-one, five hundred and seventy-three and five hundred and seventy-four, the interrogatories shall be filed in the clerk's office; the caption thereof shall state the name and place of residence of the witness; notice of the filing thereof shall be given pursuant to sections six hundred and twenty-four to six hundred and thirty-three, both inclusive, and shall be filed in the office of the clerk; and until a commission to take the deposition be issued, the party notified may file cross-interrogatories.

2. If no cross-interrogatories be filed, the clerk shall file the following:

a. What is your age, occupation and place of residence?

b. Are all of your statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information or belief, and what is the source of your information, or the foundation of your belief?

c. Have you any interest in this action direct or indirect? If any, what is it?

d. Have you stated all you know concerning this action? If not, state what you have omitted.

§ 576 [633] **Commission to take on.** No commission shall issue until ten days shall have elapsed after the giving of notice pursuant to section five hundred and seventy-five, unless cross-interrogatories be sooner filed.

§ 577 [640] **Commission and interrogatories—duty of clerk.** After the interrogatories have remained the due length of time in the clerk's office, one or more commissions, at the request of the party, shall be issued by the clerk, with copies of the interrogatories and cross-interrogatories annexed, authorizing the person to whom the commission is directed to examine witnesses on them; and the commission may be directed generally "to any officer authorized to take depositions in or out of this State." (*Form of commission, page 645.*)

§ 578 [641] **Subpœna for witnesses—officer may issue.** Upon filing with an officer authorized to take depositions a notice duly served, or a commission with interrogatories to take a deposition, it shall be the duty of the officer to issue his subpœna requiring the witness, whose deposition is desired, to appear, at a time and place to be named in the subpœna, for examination. (*Form of subpœna, page 644; officer may have witness arrested and punished for contempt, secs. 535 to 540.*)

§ 579 [442] **Powers of officer taking.** The officer before whom the deposition is taken shall decide, summarily, all objections to questions; or, if in doubt, shall permit the questions to be answered, noting the objection in the deposition. He shall have power to prevent insulting questions being put to a witness, and to stop a course of interrogation pursued unreasonably long and for mere vexation and delay.

§ 580 [443] **Statements of witness to be written.** The statements of the witness shall be written by him in the presence of the officer taking the deposition, or by the officer in the presence of the witness.

§ 581 [444] **Party nor attorney allowed at taking.** If a deposition be taken upon interrogatories, neither party nor his agent or attorney shall be present at the examination of the witness.

§ 582 [445] **Certificate of officer—what it shall state.** The officer's certificate shall state when and where the deposition was taken; that the witness was duly sworn before giving it, and that it was written and subscribed by him in the officer's presence, or was written by the officer in the presence of the witness and read to and subscribed by the witness in presence of the officer; and shall also state whether or not either of the parties, and, if either, which of them, was present in person or by agent or attorney during examination of the witness. (*Form of caption and certificate, page 644.*)

§ 583 [446] **Transmission to clerk—duty of clerk.** Excepting depositions taken by a guardian *ad litem* and by persons suing *in forma pauperis*—which shall be delivered or sent without prepayment of fees or postage—the officer, upon payment of his fees and necessary postage, shall deliver the depositions to the clerk of the court in which, or the justice before whom, the action is pending; or shall send them by mail or by private conveyance, in a sealed envelope, directed to such clerk or justice, with an indorsement showing the style of the action and that it contains depositions; but, if sent by private conveyance, the person by whom they are sent must make oath before the clerk or justice to whom they are delivered that they have not been opened

§ 582. (1) **Certificate of officer.** No alteration or amendment of the certificate of the officer taking a deposition after the deposition has been filed is allowable without the previous authority of the court entered of record. *Hall v. Renfro*, 3 Met. 51.

(2) Can the correctness of the certificate of an officer of another State be contradicted by evidence on exceptions to the depositions? If so, the exception

must be supported by clear and satisfactory evidence. *Daniel v. Toney*, 2 Met. 523.

§ 583. (1) **Delivery to clerk.** A deposition taken for a party and by him delivered to the clerk, although sealed in an envelope, was properly rejected. *Breeding v. Stamper*, 18 B. M. 175.

(2) **Deposition should not be rejected** because by oversight of clerk it was not marked filed. *Burns v. Ingersoll*, 6 R. 737.

by him or any person, in their transit. The clerk or justice shall indorse on the depositions the time and mode of their reception, and the affidavit, if any, of the person delivering them.

§ 584 [448] **Fees of officers.** For issuing a subpoena or warrant of arrest, and for summoning or arresting a witness, the same fees shall be paid as are allowed to clerks and sheriffs for similar services. (*Fees of clerks, Ky. Stat., sec. 1720; sheriff, Ky. Stat., sec. 1726.*)

SUBDIVISION 4.

EXCEPTIONS TO DEPOSITIONS.

§ 585. Depositions must be filed before trial.

§ 586. Exceptions to—how taken.

§ 587. Exception—when to be made.

§ 588. Court to pass on before trial—correction of certificate.

§ 589. Errors of court waived unless excepted to.

§ 590. Swearing of jury commencement of trial.

§ 585 [448] **Deposition must be filed before trial.** No deposition shall be read on a trial, unless, before the commencement thereof, it be filed with the papers of the case.

§ 586 [449] **Exceptions to—how taken.** Exceptions to depositions shall be in writing, specifying the grounds of objection, filed with the papers of the case, and noted on the record.

§ 585. (1) **Depositions — against whom read.** Depositions can not be read against a party who was made defendant by an amended petition filed after the depositions were taken. Depositions taken in one suit may be read in another when it appears that they were taken between the same parties, or persons claiming in privity with them. *Kerr v. Gibson*, 8 Bush 129.

(2) When a party takes a deposition and files it, and declines to read it, the adverse party has the right to read the deposition. *Musick v. Ray*, 3 Met. 427; *Weil v. Silverstone*, 6 Bush 698; *Sullivan v. Norris*, 8 Bush 519.

(3) **Practice—filing.** Party taking deposition can not make it a part of record unless he files it or lodges it with clerk for filing before case is submitted. *Long v. Kerrigan*, 13 R. 433; but where depo-

sitions have been lodged in the case and are considered by the chancellor they will be considered on appeal and should be made part of record, although clerk has failed to note or indorse them as filed. *Long v. Kerrigan*, 15 R. 65.

(4) **Record.** As to how depositions made part of record on appeal, see notes 5-8 to sec. 335.

§ 586. (1) **Exceptions to depositions** are deemed waived when the record does not show they were acted on in lower court. *Patterson v. Hansel*, 4 Bush 654; *Lewis v. Wright*, 3 Bush 311.

(2) Although a party may not object to the reading of a deposition on the first trial he does not thereby waive his right to object at the next trial. *Chapize v. Bane*, 1 Bibb 612; and see *Kincaid v. Kincaid*, 1 J. J. M. 100.

§ 587 ^[582] **Exception—when to be made.** No exception, other than to the competency of the witness, or to the relevancy or competency of the testimony, shall be regarded, unless it be filed and noted on the record before the commencement of the trial and before or during the first term of the court after the filing of the deposition.

2. Exceptions to the competency of the witness, or to the competency or relevancy of the testimony, may be made before or during the trial.

§ 588 ^[583] **Court to pass on before trial—correction of certificate.** The court, on the motion of either party, shall decide upon exceptions, other than those for incompetency or irrelevancy, before the commencement of the trial; and, if the examining officer's certificate be defective, whether exceptions have been sustained or filed or not—

1. The party for whom the deposition was taken, upon tendering to the clerk or justice having custody of the deposition money enough, if any be necessary, to pay postage upon it to and from the examining officer, may require the clerk or justice to deliver the deposition, or mail it, under seal, with half of the sum of money so tendered, to the examining officer.

2. The clerk or justice shall indorse upon the deposition the time of delivering or mailing it, and the examining officer shall indorse upon it the time and mode of its reception.

§ 587. (1) **Exceptions.** An exception that does not go to the competency of the witness, or to the competency or relevancy of his testimony, can not be considered unless filed and noted on the record before the commencement of the trial. *Estham v. Curd*, 15 B. M. 102; *Moore v. Smith*, 88 Ky. 151. See sec. 590, as to commencement of trial.

(2) When an exception to a deposition is general and goes to the whole deposition, if any part of it is competent the exception should be overruled. *L. & N. R. R. Co. v. Graves*, 78 Ky. 74. And when exceptions have been overruled it is not proper to present the same exceptions again. *Lewis v. Williams*, 4 Bush 678.

(3) It is not necessary for a party to file, before the commencement of the trial, exceptions to depositions taken before he was made a party to the suit. He can object to and save an exception to the reading of the depositions. *Kerr v. Gibson*, 8 Bush 129.

(4) On the trial of the case the defendant orally announced that he excepted to certain depositions because incompetent, and after the judge had orally announced his decision, but before it was entered, he filed written exceptions, which were held to be in time. *Cooksey v. Cassidy*, 79 Ky. 392.

(5) "The plaintiffs sued jointly, and filed joint exceptions to the depositions, and if the witnesses were competent as to any one of the plaintiffs they were competent as to all." *Allen v. Russell*, 78 Ky. 105.

(6) Where exceptions were filed to depositions after commencement of trial because of failure to have commission issued to take them, and the exceptions sustained, the court should have granted a continuance. *Moore v. Smith*, 88 Ky. 151.

§ 588. **Amending certificate.** See note 1 to sec. 582; *Hall v. Renfro*, 3 Met. 51.

3. The examining officer shall amend his certificate, if he can do so truthfully; and, whether he amend it or not, he shall return the deposition to the officer who sent it to him, and such officer shall act with reference to it as is required by section five hundred and eighty-three.

§ 589 ⁽⁶⁸⁸⁾ **Error of court waived unless excepted to.** Errors of the court, in its decisions upon exceptions to depositions, are waived unless excepted to.

§ 590 ⁽⁶⁸⁸⁾ **Swearing of jury commencement of trial.** If the trial be by jury, the swearing of the jury shall be deemed the commencement thereof.

SUBDIVISION 5.

DEPOSITIONS TO BE USED IN OTHER STATES.

§ 591. Provisions concerning.

§ 591 ⁽⁶⁸⁸⁾ **Provisions concerning.** A party desiring to take depositions in this State, to be used in judicial proceedings in other States, may produce to a judge of the county court of the county where the witnesses reside a commission authorizing the taking of such depositions or a notice duly served; whereupon, it shall be the duty of the judge to issue a subpoena requiring the witnesses to attend at a specified time and place for examination; and, in case of their failure to attend or refusal to be sworn or to testify, they may be punished as is provided in section five hundred and thirty-eight. [By similar proceedings before an examiner, justice of the peace or a notary public, depositions may be taken by such officers in this State, to be used in judicial proceedings in other States; and the officer so taking such depositions shall have the same powers in taking the same as judges of the county courts now have; but in cases of contempt and the infliction of punishment for the same, or a failure upon the part of the officer to punish for contempt, then it shall be the duty of the officer, upon the motion of the witness or either party to the suit, to promptly, in writing, report his actions and the reasons therefor to the judge of the county court for the county in which the deposition is being taken; and the court may change, modify or vacate the

§ 599. **Exceptions—waiver of.** Exceptions can not be taken in the Court of Appeals for the first time. All objections are waived which are not made in the circuit court. *Weber v. Weber*, 1

Met. 18; *Russell v. Marks*, 3 *Met.* 38; *Corn v. Simms*, 3 *Met.* 391; *Lewis v. Wright*, 3 *Bush* 311; 2 *Duv.* 234. See further, as to exceptions, notes 5-8 to sec. 335.

order of the officer, and shall render judgment for the fine imposed by the officer or by himself, and he shall, in accordance with the judgment rendered, certify to the officer what further steps shall be taken.] (*Words in brackets added by act 1884.*)

ARTICLE 3.

GENERAL RULES OF EXAMINATION.

- § 592. Order in which evidence introduced on trial.
- § 593. Court to control mode of interrogation.
- § 594. Direct and cross-examination.
- § 595. Leading questions, when permitted.
- § 596. Party can not impeach but may contradict his witness.
- § 597. Witness may be impeached by adverse party.
- § 598. Witness may be contradicted by evidence of different statements.
- § 599. Evidence of good character—when admissible.
- § 600. Re-examination of witness.
- § 601. Separation of witnesses.
- § 602. Person present may be compelled to testify.
- § 603. Judge or juror may be examined.
- § 604. Proof of writing by witness—comparison of handwriting.

§ 592 [***] **Order in which evidence introduced on trial.** The party who begins the case must, ordinarily, exhaust his evidence before the other begins. But the order of proof shall be regulated by the court, so as to expedite the trial, and enable the tribunal to obtain a clear view of the whole evidence. (*See further concerning order of proof, sec. 317.*)

§ 593 [***] **Court to control mode of interrogation.** The court shall exercise a reasonable control over the mode of interrogation, so as to make it rapid, distinct, as little annoying to the witness and as effective for the extraction of the truth as may be; but, subject to this control, the parties may put such legal and pertinent questions as they may see fit. The court, however, may stop the production of further evidence on a particular point, if the evidence upon it be already so full as to preclude reasonable doubt.

§ 594 [***] **Direct and cross-examination.** The examination of a witness by the party producing him is the direct examination; his examination, upon the same matter, by the adverse party is the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

§ 595 [***] **Leading questions, when permitted.** A question that suggests to the witness the answer which the examining party desires is a

leading question. On the direct examination, leading questions are not allowed, except under special circumstances making it appear that the interests of justice require it. On cross-examination, the adverse party may put leading questions; but, if he examine the witness on new matters, such examination is subject to the same rules as the direct examination.

§ 596. **Party may contradict but not impeach his witness.** The party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it was indispensable that the party should produce him; but he may contradict him by other evidence, and by showing that he has made statements different from his present testimony.

§ 597. **Witness may be impeached by adverse party.** A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing that he has made statements different from his present testimony, or by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief; but

§ 596. (1) **Contradiction of witness.** A party may contradict his own witness in two ways; first, by other evidence; and, second, by showing that he has made statements different from his present testimony. Either or both of these ways may be adopted, nor is it necessary, in order to enable a party to contradict his own witness by showing that he has made statements different from his present testimony, that he should be able to prove that his testimony is untrue. *Champ. v. Com.*, 2 Met. 17.

(2) A party may read a deposition taken by the adverse party, and which he declined to read, but when he does he makes the witness his own, and can not impeach him. *Musick v. Ray*, 3 Met. 428; as to contradiction by proving statements in a former deposition, see *Helm v. Handly*, 4 Litt. 220.

(3) When a party introduces a witness to prove certain facts, and the witness states that they did not transpire, he can not then introduce other witnesses to prove that the witness had said to them that the facts he had inquired about did transpire. The rule is that where a witness states a fact prejudicial to the party calling him, the latter may be allowed to show that the fact does not exist by

(20)

proving that the witness had made statements to others inconsistent with his present testimony; but where the witness does not state any fact prejudicial to the party calling him, but only fails to prove facts supposed to be beneficial, he can not be contradicted by evidence that he had previously stated the desired facts to others. *Champ. v. Com.*, 2 Met. 17; *Loving v. Com.*, 80 Ky. 507; *Blackburn v. Com.*, 12 Bush 181.

(4) See further, notes to sec. 221, Criminal Code.

§ 597. (1) **Contradiction—irrelevant matter.** A witness can not be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony. If a witness is cross-examined without objection as to collateral and irrelevant matters he can not be contradicted concerning such matters. *Kennedy v. Com.*, 14 Bush 340; *Cornelius v. Com.*, 15 B. M. 539; *Crittenden v. Com.*, 82 Ky. 164; *Meaux v. Meaux*, 81 Ky. 475.

(2) The court may permit a witness to be recalled and examined with a view of laying a foundation for contradicting his testimony in chief by showing that

not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of felony.

§ 596 ^(aaa) **Witness may be contradicted by evidence of different statements.** Before other evidence can be offered of the witness having made at

he has made statements different therefrom. *Scott v. Com.*, 4 Met. 227.

(3) **Conviction of crime.** A witness may be asked if he has been theretofore convicted of crime or arrested and sent to a work-house. *Burdette v. Com.*, 93 Ky. 76.

(4) **Impeachment of witness.** The extent of the inquiry allowable on the examination in chief is as to the general character of the witness, whether good or bad; his or her general character for truth or veracity. The general moral character of the witness is also a fair subject of inquiry; but not general character as to any particular acts of ignominy or turpitude. The particular facts can be inquired into by the other side, and such inquiry, when begun on cross-examination, may be pursued by the party impeaching; but he has no right, on the examination in chief, to inquire into particular facts, or general reputation as to such facts. *Thurman v. Virgin*, 18 B. M. 785; 79 Ky. 205; and a witness may be impeached without reference to the materiality of his testimony. *Davis v. Com.*, 95 Ky. 19.

(5) "The regular mode of inquiring into the reputation of a witness is to ask of those introduced for that purpose whether they know the general reputation of the person in question among his neighbors, and what that reputation is. The inquiry must be as to his general reputation where he is best known, or with those among whom he dwells. And when the impeaching witness is asked for what others say respecting such person, he must be able to state what is generally said by those among whom he dwells or with whom he is conversant. But it is not essential to the admissibility of such statements that they should come from those who are both neighbors and personal acquaintances of the party impeached. They are admissible if made either by those who are acquainted with

him, or those who dwell in his immediate neighborhood." *Henderson v. Hayne*, 2 Met. 342. See *Campbell v. Bannister*, 79 Ky. 205; *Furnish v. Com.*, 14 Bush 180; *Lockard v. Com.*, 87 Ky. 201.

(6) **Interest of witness may be shown.** A witness may be compelled to disclose his interest in the controversy, his motives and prejudices, with a view of enabling the jury to place a proper estimate upon his testimony. *Meaux v. Meaux*, 81 Ky. 475.

(7) **Proof of different statements.** Where a party introduces a witness and he testifies to a material fact prejudicial to the party he may be contradicted by showing that he has made different statements touching this fact. *Wrenn v. L., St. L. & T. R. R.*, 14 R. 324; and see as to proof of different statements in a deposition, *Helm v. Hanly*, 4 Litt. 220.

(8) **Privilege of witness.** A witness can not be compelled to answer any question that would tend to expose him to any kind of punishment or to a criminal charge, but he may for the purpose of impairing his credibility be examined as to facts that tend to disgrace or degrade him, although such facts are irrelevant and collateral to the main issue. *Burdett v. Com.*, 93 Ky. 76; *Pence v. Dozier*, 7 Bush 133; *Cole v. Wilson*, 18 B. M. 214; *Sodiesky v. McGhee*, 5 J. J. M. 622.

(9) See further, notes to sec. 221. Criminal Code.

(10) **Time to which evidence of character confined.** In impeaching a witness his character at the time, as well as before, he is called to testify may be proven, but the evidence of bad character should be directed to the time of the trial, and to this end, under proper circumstances, evidence of previous bad character is competent. *Manion v. Lambert*, 10 Bush 295; *Mitchell v. Com.*, 78 Ky. 219.

§ 596. (1) **Witness to be inquired of, before contradicted.** Before other evidence

another time a different statement, he must be inquired of concerning it, with the circumstances of time, place and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it.

§ 599 [***] **Evidence of good character—when admissible.** Evidence of the good character of a witness is inadmissible, until his general reputation has been impeached.

§ 600 [***] **Re-examination of witness.** A witness once examined can not be re-examined as to the same matter without leave of the court. But he may be re-examined as to any new matter upon which he has been examined by the adverse party. After the examination on both sides is concluded, the witness can not be recalled without leave of the court.

§ 601 [***] **Separation of witnesses.** If either party require it, the judge may exclude from the court-room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witnesses. [But this rule shall not apply to the parties to the action or the officers of the court.] (*Words in brackets added by act 1886.*)

can be offered of the witness having made at another time a different statement, he must be inquired of concerning the same, with the circumstances of time, place and persons present, as correctly as the examining party can present them, and if it is desired to contradict him by a writing, it must be shown to him and he be allowed to explain it. *Murphy v. May*, 9 Bush 33; *Campbell v. Bannister*, 79 Ky. 205; and see 88 Ky. 496.

(2) Where the witness is dead, and his testimony given on a former trial is reproduced, evidence that subsequent to the former trial the witness stated that the testimony given by him on that trial was false is not competent. The rule that a witness must be inquired of concerning conflicting statements, before he can be contradicted, applies when the witness is dead. *Craft v. Com.*, 81 Ky. 250; and see further, notes to sec. 221, Criminal Code.

§ 599. (1) **Good character—evidence of.** Evidence of the good character of a witness is not admissible where he is only impeached by proof of his having made

a different statement on another occasion, or by proof of facts which contradict those stated by him in his testimony. *Vance v. Vance*, 2 Met. 581; *Sullivan v. Norris*, 8 Bush 519.

(2) See further, notes to sec. 221, Criminal Code.

§ 601. (1) **Excluding witness from court-room.** The question of excluding witnesses from the court-room is left to the exercise of a sound judicial discretion, and if the presence of a witness is necessary to enable a party to properly present his case, the judge may permit him to remain. *Johnson v. Clem*, 83 Ky. 84. See further, *Salisbury v. Com.*, 79 Ky. 425; and *Walker v. Com.*, 8 Bush 86.

(2) The rule does not apply to attorneys who have the right to remain in the court-room. *Allen v. Com.*, 10 R. 582; and see further, notes to sec. 221, Criminal Code.

(3) Whether a witness who has remained in the court-room and heard all the testimony, notwithstanding an order excluding the witnesses, shall be permitted to testify is a matter in the discretion of the trial court, and unless it appear

§ 602 [1886] **Person present may be compelled to testify.** A person present before a court or before a judicial officer may be compelled to testify in the same manner as if he were served with a subpoena.

§ 603 [1887] **Judge or juror may be examined.** The judge or a juror may be called as a witness; but, in such a case, it is in the discretion of the court to suspend the trial and order it to take place before another judge or jury; and, if a party know, when the jury are sworn, that a juror is to be called by him as a witness, he shall then disclose it, and the juror shall be excluded from the jury.

§ 604 [1888] **Proof of writing—comparison of handwriting.** A writing shown to a witness may be inspected by the adverse party, and, if proved by the witness, it must be read to the jury before his testimony is closed; otherwise, it can not be read, unless the witness be recalled.

[That in any action, prosecution or proceeding, civil or criminal, which is now pending or may be commenced hereafter, upon a dispute as to the genuineness of the handwriting of a person, other handwritings of such person, though not in the case for any other purpose, may be introduced for the purpose of comparison by witnesses with the writing in dispute; and such writings, and the testimony of witnesses respecting them, may be submitted to the court or jury as evidence concerning the genuineness of the writing in dispute: *Provided, That—*

1. The genuineness of such writings shall be proved, to the satisfaction of the judge, by other than opinion evidence.

2. It must be proved, to the satisfaction of the judge, that they were written before any controversy arose as to the genuineness of the writing in dispute, and that no fraud was practiced in their selection.

3. A party proposing to introduce such writings must give reasonable notice of his intention to the opposite party or his attorney, with reasonable opportunity to examine them before commencement of the trial.

4. The judge may limit the number of such writings.

5. An error of the judge shall be subject to revision and correction in the same manner as if the error had been committed by the court.] (*Words in brackets act 1886.*)

that this discretion has been abused it will not be interfered with. *Carlton v. Com.*, 13 R. 946; and see *Galloway v. Com.*, 7 R. 165.

§ 604. **Handwritings.** It is not proper to

permit counsel to present to a witness for his opinion spurious signatures prepared by an expert, for the purpose of deceiving the witness. *Andrews v. Hayden*, 88 Ky. 455.

PART II.

COMPETENCY OF WITNESSES.

§ 605. Competency of witnesses generally.

- § 606. 1. Husband and wife—exceptions.
 2. Infant, lunatic or dead person—party against.
 3. Party against defendant constructively summoned.
 4. Party can not testify after taking testimony.
 5. Attorneys and priests as to communications and confessions.
 6. Party testifying against dead person or lunatic—how confined.
 7. Entries in book—when party may testify concerning.
 8. Prisoner can not testify—nor can party against.
 9. Assignor of claim incompetent.
 10. Adverse party may be compelled to testify.
 11. Affidavits—provisions of this section do not apply to.

§ 607. Other objections go to the credit of witnesses.

§ 608. Interrogator's testimony as to new matter in equitable actions.

§ 609. New matter in answer to interrogatories adverse party may testify.

§ 605 [***] **Competency of witnesses generally.** Subject to the exceptions and modifications contained in section six hundred and six, every person is competent to testify for himself or another, unless he be found by the court incapable of understanding the facts concerning which his testimony is offered.

§ 605. (1) **Atheist may testify.** All persons have a right to testify without regard to their religious belief or disbelief, and an inquiry as to the religious belief of a witness is improper. *Bush v. Com.*, 80 Ky. 244.

(2) **Crimes that disqualify.** Persons convicted of false swearing or perjury or subornation of perjury, or a school officer who makes a false report, or a notary a false statement as to notice in a protest, shall be disqualified from giving evidence. *Ky. Stat.*, sec. 1180. This section is substantially the same as sec. 8. art. 8, chap. 29, *Gen. Stat.*, and construing that section in *Com. v. McGuire*, 84 Ky. 57, the court said that the persons disqualified were limited to those named in the section, and see *Combs v. Com.*, 15 R. 660.

(3) **Books, production of.** The court may compel by rule the adverse party or one who is not a party to produce in court any books or documents in his possession to which the party applying for rule has

the exclusive right, or a right in common with others. *Marion Nat. Bank v. Abell*, 88 Ky. 428.

(4) The court will not require their production if the party applying has no right or interest in them; but if a party having the custody of books or documents testifies as to their contents he may then be compelled to produce them for inspection, but not in advance of that time. 88 Ky. 428.

(5) **Confessions.** See *Becker v. Crow*, 7 Bush 198.

(6) **Letters.** A party may by rule require the production of letters he has written to his adversary for the purpose of using them as evidence of a contract between them. *Marion Nat. Bank v. Abell*, 88 Ky. 428.

(7) **Prisoner in penitentiary may testify** in a criminal prosecution. *Com. v. Minor*, 89 Ky. 555; *Combs v. Com.*, 15 R. 660.

(8) **Testimony of a deceased witness—how proved.** It is not necessary that a

*See Act of 1898
Page 1*

§ 606 [470] **Husband and wife—exceptions.** 1. Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an inn-keeper or a wrong-doer, and in such action either or both of them may testify; and, except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either, but not both, of them may testify. (*See notes, page 313.*)

witness introduced to prove what a deceased witness had stated on a former trial should be able to give the precise words, or all the words, used by such witness. It is sufficient if he is able to give the substance of all that was sworn to by him. *Thompson v. Blackwell*, 17 B. M. 609; *Cave v. Cave*, 13 Bush 452.

(9) "The law is that when the witness states that he remembers the substance of all the deceased witness testified to, both on the direct and cross-examination, he is a competent witness, and when the evidence is heard, if it does not clearly appear that the witness does not remember the substance of all that the deceased person testified to, the evidence should be permitted to go to the jury; but if it be manifest to the court that he does not so remember, the evidence should be rejected. If the statement appears on its face to cover the substance of what the deceased witness testified to in reference to the material matters in issue, the evidence should be allowed to go to the jury for their consideration." *Bush v. Com.*, 80 Ky. 244.

(10) The evidence in a bill of exceptions may be read (when the witness is dead), in a civil action where a retrial has been ordered. *Kean v. Com.*, 10 Bush 190; and see *O'Brian v. Com.*, 6 Bush 563.

§ 606. (1) **Attorney.** In all other cases, except as forbidden in this subsection, an attorney is a competent witness for or against his client. *Hall v. Renfro*, 3 Met. 52. See *Rice v. Rice*, 14 B. M. 417.

(2) An attorney can not testify as to any communications made to him in his

professional capacity unless the client consents, and neither the cessation of employment or death of the client will render the evidence competent. *Carter v. West*, 93 Ky. 211.

(3) **Books—entries in.** "Entries in the books of a bank must be proved by the persons making them, unless they have died or absconded, and then the entries themselves must be proved when the books can not be produced in the court, and it is not sufficient to prove, as was done in this case, the mere conclusions of the witnesses to their substance and effect. But the entry itself, or an exact copy thereof, must be presented to the court, and, with the exceptions just named, the witness must identify it as having been made by himself, and though he need not recollect the specific transaction, he must be able to state that he would not have made the entry if the transaction had not taken place." *Poor v. Robinson*, 13 Bush 290; and see *Brannin v. Foree*, 12 B. M. 506; *Bank v. Smith*, 9 B. M. 611.

(4) Mercantile books can only be admitted as affirmative evidence, and are never admissible to establish a negative proposition; and a merchant's account book is incompetent as evidence when it shows on its face that it does not contain the original entries of the items charged in it. *Lawhorn v. Carter*, 11 Bush 7; partnership books open to inspection of parties are evidence between them. *Simms v. Kirtly*, 1 Mon. 80.

(5) Entries of sales of property may be read from the book in which they are made. *Thompson v. Brannin*, 94 Ky. 490.

2. **Infant—lunatic or dead person—party against.** Subject to the provisions of subsection seven of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless—

a. The infant or his guardian shall have testified against such person, with reference to such statement, transaction or act; or,

b. The person of unsound mind shall, when of sound mind, have testified against such person, with reference thereto; or,

c. The decedent, or a representative of, or some one interested in, his estate, shall have testified against such person, with reference thereto; or,

d. An agent of the decedent or person of unsound mind, with reference to such act or transaction, shall have testified against such person, with reference thereto, or be living when such person offers to testify, with reference thereto.

(6) **Books—rule to produce.** See notes 3-4 to sec. 605.

DECEDENT'S ESTATE, AGAINST.

(7) **Agent.** When the transaction in controversy was had with an agent, a party can not testify concerning it if the agent is dead when the testimony is offered to be given. Harpending v. Daniel, 80 Ky. 449.

(8) **Assignee—assignment.** In an action by the assignee of a note the payor can not testify as to what took place between the payee (assignor) and himself when note was executed, the payee being dead, although his estate has no interest in the matter. Hurry v. Kline, 98 Ky. 358.

(9) The fact that one has assigned his claim or has been divested of all interest in a claim against the estate of a decedent does not render him a competent witness against the estate as to the transaction out of which claim arose. Alexander v. Alford, 89 Ky. 105.

(10) **Depositions.** A party can not have

read for himself his own deposition in an action against an administrator, although it was taken during the lifetime of the administrator's intestate. Hardin v. Taylor, 78 Ky. 593; but when a party dies after giving his deposition the adverse party may give his deposition. Parent v. Mead, 3 R. 334.

(11) **Devises.** In a contest about the probate of a will a devisee is a competent witness as to transactions with the decedent. Flood v. Pragoff, 79 Ky. 607. See Cave v. Cave, 13 Bush 452; Milton v. Hunter, 13 Bush 163; Phillips v. Phillips, 81 Ky. 328; Williams v. Williams, 90 Ky. 28; and one who claims land as devisee under a will may prove declarations of the testator for the purpose of showing his title. Whallen v. Nisbet, 95 Ky. 464.

(12) **Distributees.** The distributee of an estate is not a competent witness for the administrator of his intestate in an action in the name of the administrator against another administrator. Manion v. Lambert, 10 Bush 295.

3. Party against defendant constructively summoned. No person shall testify for himself against a party who is not before the court otherwise than by constructive service of a summons.

4. Party can not testify after introducing other testimony. No person shall testify for himself, in chief, in an ordinary action, after introducing other testimony for himself, in chief; nor in an equitable action, after taking other testimony for himself, in chief.

5. Attorney and priests as to communications and confessions. No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent; nor shall a clergyman or priest testify concerning any confession made to him, in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person confessing.

6. Party testifying against dead person or lunatic. If the right of a person to testify for himself be founded upon the fact that one who is dead or of unsound mind has testified against him, the testimony of such person shall be confined to the facts or transactions to which the adverse testimony related.

(13) **General rules.** A party is a competent witness unless all the adverse parties are persons against whom he could not testify if they were sued singly. *Worthy v. Hammond*, 13 Bush 519; *Allen v. Russell*, 78 Ky. 105.

(14) Mother of a bastard is a competent witness to prove a contract made by its father with her for the support of the child, when she is not a party to the suit nor interested in the result, the action against his estate being prosecuted for the benefit of the bastard. *Stowers v. Hollis*, 83 Ky. 544.

(15) The only inhibition is as to verbal statements of or transactions with or acts done or omitted by the decedent, and a person may testify in his own behalf as to facts that do not appear to have been within the knowledge of the decedent. *Hunter v. March*, 2 R. 240.

(16) A party can not state the consideration paid to a decedent for the execution of a note by him. *Mullikin v. Mullikin*, 15 R. 609; *Andrews v. Hayden*, 88 Ky. 455.

(17) The interest of a witness may be equipoise or he may be testifying against

his interest, but this does not qualify him to testify as to a transaction with a decedent. 80 Ky. 105.

(18) A party may testify concerning transactions with a decedent when a representative of or some one interested in his estate has testified with reference thereto. *McHarry v. Irvin*, 85 Ky. 322.

(19) In an action to recover the amount of a note owned by two persons, each owning one-half—the court, in *Beach v. Cummins*, 13 R. 881, held that each might testify for the other.

(20) The beneficiary of a fund is not a competent witness for the trustee as to transactions between the decedent and a former trustee, and where it is claimed that his interest has been removed by the payment of his share in the estate before the transaction he testifies about took place, the burden is upon plaintiff to show this fact. *Hopkins v. Faeber*, 86 Ky. 223.

(21) **Partnership matters.** In an action by the surviving partner the defendant can not testify as to what took place between himself and the deceased partner in the absence of the surviving

7. Entries in books—when party may testify concerning. A person may testify for himself as to the correctness of original entries made by him against persons who are under no disability—other than coverture, or infancy and coverture combined—in an account-book, according to the usual course of business, though the person against whom they were made may have died or have become of unsound mind; but no person shall testify for himself concerning entries in a book, or the contents or purport of any writing, under the control of himself, or of himself and others jointly, if he refuse or fail to produce such book or writing, and to make it subject to the order of the court for the purposes of the action, if required to do so by the party against whom he offers to testify.

8. Prisoner can not testify, nor party against. No prisoner in a penitentiary of this State, or of any other country, shall testify; nor shall any person testify for himself against such prisoner.

partner. *Lawhorn v. Carter*, 11 Bush 7; and see *Alexander v. Alford*, 89 Ky. 105.

(22) In an action by an administrator against a firm, one of the partners can not, by letting judgment go against him, render himself a competent witness for the other partners as to transactions with the decedent. *Worthington v. Miller*, 85 Ky. 320.

(23) **Personal representative.** A personal representative can not, when sued in his representative capacity, testify as to matters occurring between himself and a decedent whose representative is prosecuting the action. *Hobbs v. Russell*, 79 Ky. 61; and see *Alexander v. Alford*, 89 Ky. 105.

(24) An administrator is not a competent witness against the infant children of his intestate in an action by them by their guardian against him to recover rents which he had collected for lands leased by him which had descended to them. *Wilson v. Unsell*, 12 Bush 215.

HUSBAND AND WIFE.

(25) **Construction.** The word "communication" in this section should not be confined to mere statements between husband and wife, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing

out of it, would not have been known to the party. *Com. v. Sapp*, 90 Ky. 580.

(26) **Divorce—effect of.** Information obtained by the husband or wife during the marital relation by reason of its existence should not be disclosed even after the relation has been dissolved. 90 Ky. 580.

(27) A divorced wife is a competent witness in behalf of her husband to prove facts which came to her knowledge while the marriage relation existed between them, but which did not come to her confidentially, nor by means of her situation as his wife. *Com. v. Sapp*, 90 Ky. 580; *Elswick v. Com.*, 13 Bush 155. See *Storms v. Storms*, 3 Bush 77.

(28) **General rules.** Either a surviving husband or wife can testify for the administrator of the other, when not interested in the result of the suit as to facts known to the witness from other means of information than such as result from the marriage relation. *English v. Cropper*, 8 Bush 292; *Short v. Tinsley*, 1 Met. 397.

(29) A widow, having no interest in the result of a suit between her husband's executor and another person, is a competent witness for the executor. *Booth v. Vanarsdale*, 9 Bush 717.

(30) The husband of one of the heirs interested in the rejection of a will, although she is not a party to the record, can not testify against her interest. *Milton v. Hunter*, 13 Bush 163.

9. **Assignor of claim incompetent.** The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another.

10. **Adverse party may be compelled to testify.** A party may compel an adverse party to testify as any other witness.

11. **Affidavits—attesting witnesses—provisions of this section do not apply to.** None of the preceding provisions of this section apply to affidavits for provisional remedies, or to affidavits of claimants against the estates of deceased or insolvent persons, or affect the competency of attesting witnesses of instruments which are required by law to be attested. (*Evidence as to disputed hand-writings, see act, sec. 604.*)

§ 607 [611] **Other objections go to the credit of witnesses.** All other objections to witnesses shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered.

(31) Neither husband nor wife can testify in any case against the other. When the wife is the beneficiary of the action she may testify, but both she and her husband can not; and in such case she has the right to elect to offer herself as a witness and to exclude by her election her husband. *Wise v. Foote*, 81 Ky. 10; *Booth v. Vanarsdale*, 9 Bush 717.

(32) In an action by creditors of the husband to set aside a conveyance to the wife as fraudulent the husband is a competent witness for the wife. *Howard v. Tenney*, 87 Ky. 52; and in such case where the creditor takes the evidence of the wife the husband may testify for himself. *Truitt v. Curd*, 13 R. 118.

(33) In an action for damages caused by injury to real property owned jointly by the husband and wife, either, but not both, may testify. *City of Cov. v. Geyler*, 93 Ky. 275.

(34) **Lost writing—contents of** may be proved, but before admitting parol evidence of contents, it should clearly appear that writing was lost or destroyed. *Pluney v. Pindell*, 7 Bush 571; and that, after due diligence, it can not be found. *Dickerson v. Talbott*, 14 B. M. 60.

(35) Ordinarily the existence of a written contract alleged to have been lost, or not in the custody of party attempting to enforce it, must be established by the attesting witnesses, if any, or, if none, by

those who saw the contract and were either present when it was entered into or recognized the handwriting of the parties to it after it had been executed and delivered. *Benjamin v. Ellinger*, 80 Ky. 472; *Gillaspie v. Osborn*, 3 Mar. 80; *McMurtry v. Peebles*, 4 Mon. 40; *Clark v. Bartlett*, 4 Bibb 401; *Senteney v. Overton*, 4 Bibb 445.

(36) Where a party has a paper and refuses to produce it, parol evidence of its contents is admissible, and every presumption is to be indulged against party failing to produce paper. 80 Ky. 472.

(37) Parol evidence of lost records of a corporation is competent. *Sinking Fund v. Bank*, 1 Met. 174.

(38) Where a writing is out of the State its contents may be proved. *Waller v. Cralle*, 8 B. M. 14.

(39) **Non-resident—against.** One of two partners mortgaged his interest in the partnership property and left the State, and the mortgagee brought suit to foreclose against him by constructive service, and his partner by actual service of process. The latter claimed a prior lien on the partnership property. Neither the mortgagee nor the partner who asserted lien was competent as a witness against the defendant constructively summoned. *Love v. Cummings*, 10 Bush 578.

(40) **Prisoner in penitentiary may testify**

§ 608 [672] **Interrogator's testimony as to new matter in equitable action.** In equitable actions, if a party, in answering interrogatories, state new matters not responsive to the inquiries, the party interrogating may, before the trial, file his written statement, under oath, concerning such new matters, which shall be read as a deposition, though the party so answering may have died or have become a prisoner or of unsound mind. (*Provisions concerning interrogatories, secs. 140 to 151.*)

§ 609 [673] **New matter in answers to interrogatories adverse party may testify.** In ordinary actions, if a party, in answering interrogatories, or when introduced as a witness, state new matters not responsive to the inquiries of the adverse party, the latter shall be allowed to testify orally concerning such new matter, though the party so answering may have died or have become a prisoner or of unsound mind.

PART III.

PERPETUATION OF EVIDENCE.

§ 610. How and by whom perpetuated.

§ 611. Proceedings against adverse party.

§ 612. Depositions—how taken—costs.

§ 613. Depositions—when may be read.

§ 614. Copies of deposition—when may be read.

§ 615. Evidence heretofore perpetuated may be read.

§ 610 [676] **How and by whom perpetuated.** A person who resides in this State and expects to be a party to an action in a court hereof; or who, being a non-resident of this State, has an interest in real property herein, concerning which he expects to be a party to an action in a court hereof; and who desires to perpetuate the testimony of witnesses, may file, in the circuit court of the county in which he resides, or in which the property is situated, a petition in equity, verified by his affidavit, stating—

in a criminal prosecution. *Com. v. Minor*, 89 Ky. 555; *Combs v. Com.*, 15 R. 660.

(41) **Testimony in chief after others have testified.** Where the answer of one of two defendants operates for both, the defendant not answering can not testify in chief for his co-defendant after the latter has taken other testimony. *American Nail Co. v. Bayless*, 91 Ky. 94.

(42) Where a party withdraws his testimony in chief and then offers to testify for himself, the court will not consider the testimony of the party or that withdrawn. *Allison v. Moore*, 3 R. 326.

(43) It is too late to raise the question for the first time in Court of Appeals that party took other depositions before he gave his own. *Hampton v. Bailey*, 9 R. 423.

1. That he expects to be a party to an action in a court of this State, and the nature of the expected controversy.

2. The name, age and place of residence of the expected adverse party, if known by the petitioner; or his ignorance thereof, if not known by him.

3. That the evidence of witnesses—whose names and the facts, generally, expected to be proved, shall be stated—is believed by the petitioner to be material to him.

4. The obstacles preventing the commencement of the action or proceeding, if he expects to commence the same.

§ 611 (577, 579) **Proceedings against adverse party.** 1. The expected adverse party shall be summoned and proceeded against in the same manner as a defendant to an action.

2. After such expected party is brought before the court, actually or constructively, the court may, in its discretion, make an order for the examination of the witnesses.

§ 612 (578 to 580) **Depositions how taken—costs.** 1. If the examination of the witnesses be permitted by the court, their depositions shall be taken, certified and delivered or sent to the clerk of the court, and be kept by him, as depositions in equitable actions.

2. The petitioner shall pay all costs incurred.

§ 613 (581) **Depositions—when may be read.** Upon a trial of the controversy in the petition mentioned, between the persons therein named as expected parties or their representatives or successors, such depositions, subject to exceptions as if they had been taken pending the action, may be read by either party under the circumstances prescribed in section five hundred and fifty-four.

§ 614 (582) **Copies may be read—when.** If the trial be not in the court in which the deposition is filed, it and the affidavit, order, notice and proof of service, or certified copies thereof, may be read as evidence.

§ 615 (583) **Evidence heretofore perpetuated may be read.** Evidence which has been or may be perpetuated, agreeably to laws heretofore in force, may be read on the trial of any action or suit which has been or may be commenced in any court of this State, subject to exceptions as if they had been taken pending such suit or action.

TITLE XIV.

MISCELLANEOUS PROCEEDINGS.

- CHAPTER I. SECURITY FOR COSTS, 616.
- II. MOTIONS AND NOTICES, 622.
- III. OFFER TO COMPROMISE, 634.
- IV. SUBMITTING A CONTROVERSY, 637.
- V. OFFER TO CONFESS JUDGMENT, 640.
- VI. PROCEEDINGS UPON EXECUTIONS AND DISTRESS WARRANTS, 641.
- VII. PROCEEDINGS BY SURETIES, 661.

CHAPTER I.

SECURITY FOR COSTS.

- § 616. Non-residents and corporations except banks.
- § 617. Action to be dismissed if bond not given.
- § 618. Plaintiff becoming non-resident must give bond.
- § 619. Other persons who may be required to secure costs.
- § 620. Additional security may be required.
- § 621. Attorney liable until bond given.

§ 616 (604) **Non-residents and corporations except banks.** A plaintiff who is a non-resident of this State, or a corporation other than a bank created by the laws of this State, before commencing an action, shall file in the clerk's office a bond of a sufficient surety, to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the courts. (*Form of bond, page 626; provisions of this chapter apply to parties in Court of Appeals, sec. 744.*)

§ 617 (605) **Action to be dismissed if bond not given.** An action in which a bond for costs is not given, as is required by section six hundred and sixteen, shall be dismissed on the motion of the defendant at any time before judgment, unless in a reasonable time, to be allowed by the court, after the motion is made therefor, such bond be filed,

§ 616. (1) **Costs.** A person may, by a recognizance of record, become security for costs, and in such case the liability of the surety may be enforced by summary proceedings. *Kinney v. O'Bannon*, 6 Bush 692.

(2) As to security for costs in Court of

Appeals, see sec. 744; and *Paducah Hotel Co. v. Dennis Long*, 92 Ky. 278.

(3) **New trial upon payment of costs.** See Ky. Stat., sec. 899, and *Myers v. Lummis*, 80 Ky. 456; *Galbraith v. Galbraith*, 5 R. 859; *Mattingly v. L. & N. R. R.*, 92 Ky. 463; *Carbon v. Stout*, 7 Bush 609.

securing all past and future costs; and the action shall not be dismissed or abated, if a bond for costs be given in such time as the court may allow.

§ 618 [***] **Plaintiff becoming non-resident must give bond.** If the plaintiff in an action, after its institution, become a non-resident of this State, he shall give security for costs in the manner and under the restrictions provided in the preceding sections of this chapter.

§ 619 [***] **Other persons who may be required to secure costs.** A guardian, curator, committee or next friend, suing for a person under disability; and every plaintiff suing as an assignee, except an indorsee of a bill of exchange or a promissory note placed upon the footing of a bill of exchange, when insolvent, may be required to give security for costs; and on failure to do so in a reasonable time after it is directed by the court, upon the motion of the defendant his action shall be dismissed.

§ 620 [***] **Additional security may be required.** In an action in which a bond for costs has been given, the defendant may at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court be satisfied that the surety in the plaintiff's bond has removed from this State, or is not sufficient for the amount thereof, it may dismiss the action, unless in a reasonable time, to be fixed by the court, sufficient security be given by the plaintiff.

§ 621 [***] **Attorney liable until bond given.** If process be issued in an action by the direction of an attorney for a plaintiff who is required by the first section of this chapter to give security for costs, but who has failed to do so, the attorney shall be liable as surety for the costs in the action, until a bond is given; and his liability may be enforced by orders of court, and by proceedings as for contempt, if they be not obeyed.

§ 619. Poor infant may be permitted to prosecute an action by an insolvent next friend, without giving security for costs. *Westerfield v. Wilson*, 12 Bush 125; and see sec. 37 of Code; and Ky. Stat., sec. 884.

§ 621. (1) Attorney who prays and prosecutes an appeal to the Court of Ap-

peals for a non-resident defendant is not liable for costs. *Christmas v. Russell*, 2 Met. 112.

(2) It is only where an attorney for a plaintiff directs process to issue that he is liable for costs; the attorney for defendant is not liable for any costs under this section. 2 Met. 112.

CHAPTER II.

MOTIONS AND NOTICES.

- § 622. Orders of court defined.
- § 623. Motion defined.
- § 624. Notices—requisites of and who may serve.
- § 625. Notice—how served.
- § 626. Notice—when court may direct mode of serving.
- § 627. Persons under disability—service on.
- § 628. Corporation—service on.
- § 629. Husband and wife—service on.
- § 630. Person constructively summoned—service on.
- § 631. Attorney—when service on sufficient.
- § 632. Depositions—service of notice to take.
- § 633. Officer to execute notice—penalty for failure.

§ 622⁽⁶⁰⁰⁾ **Order of court defined.** A direction or decision of a court or judge entered upon the order-book or made in writing, in an action, and not final, is an order. (*What orders final, secs. 266, 298, 475.*)

§ 623⁽⁶⁰¹⁾ **Motion defined.** An application for an order is a motion.

§ 624⁽⁶⁰²⁾ **Notices—requisites of and who may serve.** 1. The notices mentioned in this Code must be in writing, must concisely state the purport thereof, and may be served by an officer who is authorized to serve a summons, or by any person who is over the age of sixteen years and not a party to, nor interested in, the action.

2. The person who serves a notice must, by an indorsement on it, state when and how it was served; and, if a copy of it be not delivered to the person to whom it is directed, the indorsement must state the facts authorizing the manner of service pursued.

3. If the person who serves the notice be an officer, his indorsement must show his official position; if he be not an officer, he must make an affidavit that his indorsement is true, that he is over sixteen years of age, and that he is not a party to, nor interested in, the action.

§ 622. **Orders that are final.** See notes to secs. 368, 734.

§ 623. **Motion.** See secs. 444-449 and notes thereto; and as to entry on motion docket, see sec. 352 and note.

§ 624. (1) **Notice — waiver.** When a party appears to a notice defective in form, and without objection makes defense to the merits, he virtually admits that he is fully informed of the claim asserted against him, and that he is as

well prepared to meet it as if it were more specifically set forth, and he can not afterward object to the notice. *Brown v. Gibson*, 78 Ky. 692.

(2) **Service of notice.** A sheriff's return on a notice that he executed it by leaving a copy with the wife of the defendant, he not being at home, is sufficient. The presumption is that the sheriff did his duty. *Fleece v. Goodrum*, 1 Duv. 306; and see further, as to

4. Such indorsement of an officer, and such indorsement and affidavit of one who is not an officer, shall be proof of the service. (*Officers who can serve summons, sec. 667.*)

§ 625 [603] **Notice—how served.** A notice may be served by delivering a copy of it to the person to whom it is directed, or by offering to deliver it to him; or, if he can not be found at his usual place of abode, by leaving a copy there with a person over the age of sixteen years residing in the same family with him; or, if no such person be there, by affixing such copy to the front door of such place of abode; or, if the person to whom the notice is directed can not be found and has no known place of abode in this State, the notice may be served by delivering a copy to his agent or attorney.

§ 626 [604] **Court may direct mode of serving—when.** If the person to whom a notice is directed have no known place of abode in this State and no known attorney residing in this State; or, if the persons to be notified be numerous, the court may direct the mode of serving the notices, and to what persons, if any, they shall be given. A certified copy of the order must be returned with the service of the notice.

§ 627 [605] **Person under disability—service on.** A notice to a person who is under any disability, excepting coverture, or infancy and coverture combined, shall be served on his guardian, guardian *ad litem*, curator, committee or next friend, if he have one, who represents him in the action.

§ 628 [606] **Corporation—service on.** A notice to a corporation may be served on its chief officer or agent, or on its attorney. (*Who is "chief officer or agent," secs. 732-33.*)

§ 629 [607] **Husband and wife—service on.** If husband and wife unite in bringing or defending an action, the service of a notice on the husband shall be deemed a service on the wife.

§ 630 [608] **Person constructively summoned—service on.** A notice to a person constructively summoned and not appearing shall be served on the attorney appointed to defend for him.

§ 631 [609] **Attorney—when service on sufficient.** Unless it be otherwise specially provided in this Code, a notice to a party in an action of any motion or proceeding to be made or taken therein, in court or

presumption that officer did his duty, and difference between effect of return by officer and return by one not an officer, notes to sec. 48.

§ 625. **Service of notice** by delivering a copy of it to a person residing in the same family with the person to whom it

is directed, although the person to whom it is delivered may not at the time be at the residence, is sufficient, if person to whom notice is directed can not be found. *Broadbush v. Mason*, 16 R. 38; and see further, notes to sec. 48.

before a judge, may be served upon such party or his attorney; but the service upon the attorney must be by delivering to him a copy of the notice.

§ 632 [700] **Depositions—service of notice to take.** If a party to an action, or his guardian, guardian *ad litem*, curator, committee or next friend, do not reside in the county in which it is pending, a notice to him to take depositions may be served by delivering a copy thereof to his attorney.

§ 633 [701] **Officer to execute notice—penalty for failure.** An officer to whom any notice in an action is properly delivered for service within his county shall serve and return it to the party who delivered it to him. A failure to perform this duty may be punished as a disobedience of the process of the court.

CHAPTER III.

OFFER TO COMPROMISE.

§ 634. Offer of defendant before trial—effect—notice.

§ 635. Offer of defendant after answer—effect—notice.

§ 636. Offer not cause for continuance.

§ 634 [702] **Offer of defendant before trial—effect—notice.** The defendant in an action for the recovery of money only may, at any time before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum specified therein. If the plaintiff accept the offer, and give notice thereof to the defendant or his attorney, within five days after the offer was served, the offer and an affidavit that the notice of acceptance was delivered in the time limited may be filed by the plaintiff; or the defendant may file the acceptance, with a copy of the offer verified by affidavit; and, in either case, the offer and acceptance shall be noted upon the record, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence

§ 632. Notice to take depositions executed on attorney appointed for non-resident infants and before a guardian *ad litem* is appointed, may be read after defense has been made for them. C. & L. R. R. v. Bowler, 9 Bush 468.

(21)

§ 634. **Compromise—attorney—power of.** An attorney at law, under his general authority as such, independent of any special authority conferred upon him by his client, has no power to compromise the suit or to surrender the claim of his

nor mentioned on the trial. If the plaintiff fail to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer.

§ 635 (703) **Offer by defendant after answer—effect—notice.** In an action for the recovery of money only, the defendant, having answered, may serve upon the plaintiff or his attorney an offer in writing that, if he fail in his defense, the amount of the recovery shall be assessed at a specified sum. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney, within five days after it was served, and the defendant fail in his defense, the judgment shall be for the amount so agreed upon. If the plaintiff do not accept the offer, he shall prove the amount to be recovered, as if the offer had not been made. The offer shall not be given in evidence nor mentioned on the trial. And, if the amount recovered by the plaintiff do not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in the defense in respect to the question of amount, to be taxed under the direction of the court.

§ 636 (704) **Offer not cause for continuance.** The making of any offer, pursuant to the provisions of this chapter, shall not be a cause for a continuance of an action or a postponement of a trial.

CHAPTER IV.

SUBMITTING A CONTROVERSY.

§ 637. Parties may submit agreed case to the court.

§ 638. Record of agreed case—what constitutes.

§ 639. Judgment in—appeal from.

§ 637 (705) **Parties may submit agreed case to the court.** Parties to a question which might be the subject of a civil action may, without action,

client and dismiss the action. *Smith v. Dixon*, 3 Met. 438.

§ 635. (1) **Offer to confess judgment—costs.** "This section applies alone to cases in which something more than the mere amount of recovery is involved. The defendant must rely upon a defense that goes to the whole action, or to some item or distinct portion of it, before he can avail himself of the benefit of this section;" when the only matter in dispute is the amount of recovery to which

plaintiff is entitled, sec. 640 applies. *Maxwell v. Dudley*, 13 Bush 403.

(2) If defendant offer in his answer to confess judgment for a specified amount and plaintiff refuses to accept it, the defendant should not be charged with any costs after offer unless plaintiff recover more than was offered. *Bull v. Harrigan*, 17 B. M. 349.

§ 637. (1) **Agreed case—jurisdiction.** The circuit court has no authority to hear and decide an agreed case unless an

state the question and the facts upon which it depends, and present a submission thereof to any court which would have jurisdiction, if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall, thereupon, hear and determine the case, and render judgment as if an action were pending.

§ 638 [700] **Record of agreed case—what constitutes.** The case, the submission and the judgment shall constitute the record.

§ 639 [701] **Judgment in—appeal from.** The judgment shall be with costs, and may be enforced, and shall be subject to reversal, in the same manner as if it had been rendered in an action, unless otherwise provided in the submission.

CHAPTER V.

OFFER TO CONFESS JUDGMENT.

§ 640. How made—effect of refusal to accept.

§ 640 [702] **How offer made—effect of plaintiff's refusal to accept.** After an action for the recovery of money is brought, the defendant may offer, in court, to confess judgment for part of the amount claimed or part of the causes involved in the action. Whereupon, if the plaintiff, being present, refuse to accept such confession of judgment in full of his demands; or, having had reasonable notice that the offer would be made, of its amount, and of the time of making it, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence upon the trial.

affidavit is filed stating that the controversy is real, and the proceedings in good faith to determine the rights of the parties. *Jones v. Hoffman*, 18 B. M. 656.

(2) But where the agreement consists in a brief statement on the record and does not dispense with proof of the facts upon which judgment is sought, they remaining to be established by testimony, the mode of presenting the case is irregular and inconvenient, but the court has

jurisdiction to try it without an affidavit being filed. *Canady v. Hopkins*, 7 Bush 108.

§ 640. **Offer to confess.** The offer must be made in court either when the plaintiff is present, or at a time when he is notified that it will be made (*Maxwell v. Dudley*, 13 Bush 403); and if the plaintiff declines to accept the offer he is not entitled to recover his costs expended after it is made. *Evans v. Chapel*, 13 Bush 121; *Bull v. Harragan*, 17 B. M. 340.

CHAPTER VI.

PROCEEDINGS UPON EXECUTIONS AND DISTRESS WARRANTS.

- § 641. Bond of indemnity—officer may require.
- § 642. Bond not given, officer may refuse to act.
- § 643. Claimant or purchaser must look to bond.
- § 644. Surplus proceeds of sale—disposition of.
- § 645. Claimant may suspend sale by executing bond.
- § 646. Appraisement of property.
- § 647. Bond and appraisement—to what court returned.
- § 648. Motion for judgment on bond—trial of.
- § 649. Appraisement may be objected to.
- § 650. Claimant's bond does not discharge levy—motion to discharge.
- § 651. Executions from inferior courts—proceedings upon.
- § 652. Distress warrants—preceding sections applicable to.
- § 653. Tenant may give bond and discharge levy—appraisement.
- § 654. Motion by plaintiff for judgment—defenses allowed.
- § 655. Trial of motion by justice.
- § 656. Trial of motion if made in court.
- § 657. Judgment for rent and damages—execution on.
- § 658. Tenant may suspend part of warrant.
- § 659. Ancient trial of right of property abolished.
- § 660. Execution levied on joint property—proceedings.

§ 641 [700] **Bond of indemnity—officer may require.** If an officer, who levies or is required to levy an execution upon personal property, doubt whether it is subject to the execution, he may give to the plaintiff therein, or his agent or attorney, notice that an indemnifying bond is

§ 641. (1) **Action on bond.** An execution defendant may maintain an action on the bond to recover the value of property sold, and which was exempt from seizure and sale under the execution. *Dixon v. Bacon*, 3 Bush 534.

(2) **Action against purchaser.** The execution of a bond does not deprive a claimant of the property seized of his right to sue the purchaser at the execution sale for recovery of the property or its value. *Bethel v. Vanmeter*, 9 R. 331.

(3) **Defective bond—action against officer.** A bond which contains no covenant to pay to the claimant of any property seized or sold the damages sustained by such claimant, presents no bar to an action against the officer by such claimant. *Jewell v. Mills*, 3 Bush 62.

(4) **Equitable claimant—action by on bond.** A person who has a lien on the property sold may maintain an action on the

bond. It is intended to protect all legal as well as equitable claimants. *Watts v. Cook*, 2 Bush 141.

(5) **Liability of sheriff generally.** When the sheriff acts in good faith, having no sufficient reason to doubt the title, he is not responsible to the purchaser. But when informed as to the existence of an adverse claim, or being in possession of facts which should place one of ordinary prudence on inquiry in regard to the title, it is his duty to take a bond of indemnity to protect the purchaser, as well as the claimant, or he should notify the purchaser of the defect in the title; and a failure to do either will render him liable in such case to a suit by the purchaser. *Harrison v. Shanks*, 13 Bush 620; *Anderson v. West*, 80 Ky. 171.

(6) **Obligors in bond—liability of.** If property not subject to execution is levied on and an indemnifying bond given, and a

required. Bond may, thereupon, be given by or for the plaintiff, with one or more sufficient sureties, to be approved by the officer, to the effect that the obligors therein will indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property; and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale; and will warrant to any purchaser of the property such estate or interest therein as is sold; and, thereupon, the officer shall proceed to subject the property to the execution, and, subject to the provisions of section six hundred and fifty-one, shall return the indemnifying bond to the circuit court of the county in which the levy is made. (*Form of bond, page 640; of execution, page 638; of replevin bond, page 641; of sale bond, page 641.*)

sale is made for more than sufficient to satisfy the execution, the obligors in the bond are liable not only for the amount of the execution, but for the entire damages sustained in consequence of the seizure and sale. *Secrets v. Markwell*, 11 Bush 316.

(7) **Officer may require bond.** Whenever an officer in good faith and in the exercise of his official discretion doubts whether the property is subject to levy or sale, the law gives him the right to demand the bond of indemnity. This right is not confined to any particular class of cases, and the existence of such a doubt is the sole condition upon which the right depends. *Board v. Helm*, 2 Met. 500.

(8) **Officer—when bond protection to.** To entitle an officer to the protection afforded by a bond of indemnity, he must show a strict compliance on his part with the several conditions on which alone such protection is afforded. Those conditions are that he shall have taken and returned the indemnifying bond, and that the surety therein was good when it was taken. Each is indispensable. *Green v. Hackley*, 3 Met. 387; *Rudy v. Johnson*, 11 Bush 543; *Carrington v. Herrin*, 4 Bush 624.

If the officer desires complete protection he should require the execution of the bond before making the levy. The seizure of the property is of itself a trespass and the claimant may institute an action at once, and a bond taken after suit is commenced will not defeat so

much of the action as seeks a recovery for the damages incident to its seizure and its detention up to the date of the bond. *Rudy v. Johnson*, 11 Bush 543.

(9) The officer may, if he sees proper, advertise the sale of the property and may await the execution of the bond until the hour of sale has arrived; and if it be then executed he may proceed to sell, and return it to the proper office as soon thereafter as it can reasonably be returned, and may rely upon its execution and return as a bar to an action to recover the value of the property sold, and also as a bar to a recovery for damages for the seizure and detention of the property, unless the action was instituted before the date of the execution of the bond. 11 Bush 543.

(10) **Return of bond by officer.** "What will amount to reasonable dispatch in the return of the bond must necessarily depend upon the facts of each particular case, but we are of opinion that the return on the day succeeding the sale ought to be regarded as legal diligence under any circumstances." 11 Bush 543.

(11) If he requires the bond after the seizure of the property and makes due return thereof, he will thus wholly defeat any action that may be instituted against him after he has taken the bond; but if the claimant sued before the bond was taken, its execution and return will defeat only so much of the action as seeks a recovery for the value of the property. 11 Bush 543.

§ 642 [710] **Bond not given, officer may refuse to proceed.** If the bond mentioned in the last section be not given, the officer may refuse to levy the execution; or, if it have been levied, and the bond be not given in a reasonable time after it is required by the officer, he may restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

§ 643 [711] **Claimant, or purchaser, must look to the bond.** The claimant or purchaser of any property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property, if the surety in the bond was good when it was taken. And such claimant or purchaser may maintain an action upon the bond and recover such damages as he may be entitled to. (*Plaintiff in execution may be made defendant in suit against officer, sec. 32.*)

§ 644 [712] **Surplus proceeds of sale, disposition of.** If property, for the sale of which the officer is indemnified, be sold for more than enough to satisfy the execution under which it was taken, the surplus shall be paid into the court to which the indemnifying bond is directed to be returned. That court may order such disposition or payment of the money to be made, temporarily or absolutely, as may be proper, in respect to the rights of the parties interested.

§ 645 [713] **Claimant may suspend sale by executing bond.** The sale of personal property upon which an execution is levied shall be suspended at the instance of any person—other than the defendant in the execu-

(12) **Sheriff—liability of for failing to sell when bond given.** Although it is made the duty of the sheriff to sell the property levied on when a bond is given, yet if he fail to do so he is only liable for such damages as the plaintiff actually sustained by his misconduct, and may show, in an action on his bond, that the property was not subject to execution, and the title was in some one else, in mitigation of damages. *Snoddy v. Foster*, 1 Met. 160.

(13) **Substitution of plaintiff for officer.** Where an officer levies an execution and takes a bond of indemnity and returns the same, if suit is brought against the officer, and the plaintiff in the execution be substituted as defendant, instead of the officer, as provided in sec. 32, he may plead in bar of the action the execution of the bond. *Gunn v. Gudehus*, 15 B. M. 447.

§ 642. See notes 7, 8, sec. 641.

§ 643. (1) **Claimant—action by on bond.** The claimant or a purchaser may maintain an action on the bond, although the officer has not returned it, or may maintain an action against the officer, if he has become liable. *Chisolm v. Gooch*, 79 Ky. 468. See further, notes to sec. 641.

(2) **Claimant may sue purchaser.** The execution of a bond does not deprive a claimant of his right to sue for a recovery of the property or its value. *Bethel v. Vanmeter*, 9 R. 331, and see sec. 211 and note thereto.

§ 645. (1) **Bond of claimant.** The claimant's bond must be executed to the plaintiff in the execution, and not to the beneficial owner of the judgment and execution, or the assignee thereof for whose benefit the execution issues, or it can not be proceeded upon by motion, as

tion—claiming the property, who shall execute, with one or more sureties sufficient for double its value, a bond to the plaintiff in the execution, to the effect that, if it shall be adjudged that the property or any part of it is subject to the execution, he will pay to the plaintiff the value of the property so subject, and ten per cent thereon, not exceeding the amount due on the execution, and ten per cent thereon. (*Form of bond, page 640; if defective new one may be executed, sec. 682; sureties may be sworn; qualifications of, secs. 683, 684.*)

§ 646 (714) **Appraisement of property.** For the purpose of taking the bond mentioned in the last section, the officer shall select three disinterested housekeepers, and administer to them an oath to make a fair appraisement of each article of the property—whose appraisement, in writing, shall be recited in the bond. (*Form of appraisement, p. 640.*)

§ 647 (715) **Bond and appraisement—to what court returned.** Subject to the provisions of section six hundred and fifty-one, the bond, with the appraisement annexed thereto, shall be returned to the circuit court of the county in which the levy was made.

§ 648 (716) **Motion for judgment on bond—trial of.** The party to whom the bond is executed may move the court to which it is returned for a judgment thereon against all or any of the obligors or their representatives, having given to them ten days' notice of the motion. The court shall direct a jury to be impaneled, and may cause such

provided in sec. 648. *Lair v. Wilson*, 13 Bush 589; *Watson v. Gabby*, 18 B. M. 658.

(2) **Debt may be replevied after execution of claimant's bond.** The execution of the claimant's bond does not prevent the execution defendants from replevying the debt. *Southern bank v. White*, 1 Duv. 200.

(3) **Estoppel of obligors in bond.** Where a third person executed a forthcoming bond for property levied on, the bond reciting that it was the property of the execution defendant, he could not afterward, without proof of fraud or mistake, assert ownership and claim to the property by executing a claimant's bond, and thereby prevent judgment against him on the forthcoming bond. *Sparks v. Shropshire*, 4 Bush 550.

(4) **Execution of bond by landlord or surety for tenant.** Sale under an execution levy on property of a tenant upon which his landlord has a lien for rent may be suspended by the landlord, or by

the surety of the tenant on his bond for rent, by executing the bond provided in this section. On such bond, when the property levied on will not pay the rent, the plaintiff in the execution is not entitled to any judgment. *Smith v. Wells*, 4 Bush 92.

(5) **Rights of obligors in bond.** When a sale of personal property, upon which an execution has been levied, is suspended by the execution of a claimant's bond by persons not defendants in the execution, they may show any equitable cause against judgment, in whole or in part, on the bond. *Williams v. Smith*, 4 Bush 540; overruling *Watson v. Gabby*, 18 B. M. 658. See *Couchman v. Maupin*, 78 Ky. 33.

§ 648. (1) **Damages to be ascertained.** A judgment ordering the payment of damages by reference to the bond, without ascertaining and fixing the amount to be recovered, is erroneous. *Smith v. Wells*, 4 Bush 92.

(2) **Effect of replevying the debt.** When

issues to be tried as it may prescribe, and direct which party shall be considered plaintiff in the issues. If the property, or any part of it, be found subject to the execution, judgment shall be rendered in favor of the plaintiff therein for the value of the property so subject and ten per cent thereon, not exceeding the amount due on the execution and ten per cent thereon. An execution may be issued upon the judgment forthwith, on which the same indorsement shall be made as on the execution in virtue of which the property had been seized. (*See further as to mode of proceeding, secs. 444 to 450.*)

§ 649 [717] **Appraisement may be objected to.** Upon the trial of the motion, either party may object that the property was not fairly appraised; and, thereupon, the jury trying the facts shall hear evidence respecting, and find, the value of the property.

§ 650 [718] **Bond does not discharge levy—motion to discharge.** 1. The giving of the bond mentioned in section six hundred and forty-five shall not discharge the levy of the execution upon the property claimed. But the officer may leave it, subject to the lien of the levy, with the person in whose possession it was found, pending the pro-

the defendants in the execution replevy it after the execution of the claimant's bond, the obligors in the bond are liable for the ten per cent damages and the costs resulting from the execution of the bond; and if the replevin bond should be quashed the plaintiffs in the execution can proceed on the claimant's bond. *Southern Bank v. White*, 1 Duv. 290.

(3) **Estoppel.** If a third party executes a forthcoming bond reciting that the property levied on is owned by execution defendant he can not, without proof of fraud or mistake, assert ownership to the property and thereby prevent judgment against himself on bond. *Sparks v. Shropshire*, 4 Bush 550.

(4) **Motion on bond—pleadings.** The defendants in the motion may be permitted by the court to file an answer. This Code, sec. 449, permits written pleadings in proceedings of this character. *Couchman v. Maupin*, 78 Ky. 33. Can the motion be transferred to equity? 78 Ky. 33.

(5) Where the parties see proper to commence the proceedings by pleadings the case should be treated as if written pleadings were required and the rules applicable to pleadings obtain. *Sargent v. Farrar*, 2 R. 212.

(6) **Notice.** In determining the sufficiency of the notice required to be given before motion on the bond is made, it should be considered in connection with the bond (*Smith v. Wells*, 4 Bush 92); and when a party appears to a notice defective in form, and, without objection, makes defense to the merits, he virtually admits that he is fully informed of the claim asserted against him, and can not thereafter object to the sufficiency of the notice. *Brown v. Gibson*, 78 Ky. 602; *Fleckham v. Black*, 1 R. 164. Notice may be amended. *Combs v. Wallace*, 3 R. 384.

(7) **Plaintiff in motion** is not required to state in the notice or show upon the trial that he sustained any loss by reason of execution of bond or that he could not have collected his debt otherwise than by a sale of the property claimed. If the property was subject to his execution when levy was made he is entitled to judgment. *Combs v. Wallace*, 3 R. 384.

§ 650. **Execution of bond does not prevent the sheriff from proceeding against other property of the defendant to make the execution.** *Southern Bank v. White*, 1 Duv. 290.

ceeding on the bond; and may, in the meantime, proceed with the execution against any other property of the defendant.

2. The obligor in such bond may, however, on ten days' notice to the plaintiff in the execution, move the court to which the bond is returned to discharge the same and release the levy under the execution. The provisions of sections six hundred and forty-eight and six hundred and forty-nine shall, so far as applicable, govern the proceedings upon such motion.

§ 651 ⁽⁷¹⁹⁾ **Proceeding upon executions from inferior courts—appeal.** The foregoing provisions of this chapter shall apply to proceedings upon executions issued by judges of quarterly courts or by justices of the peace, with these exceptions:

1. Indemnifying bonds shall be returned with the executions under which they are taken.

2. Claimants' bonds shall be returned to any justice of the peace of the county, and motion thereon may be made before him, on five days' notice. He shall cause a jury to be impaneled to find whether the property is subject to the execution, subject to an appeal if the value of the property exceed ten dollars.

§ 652 ⁽⁷²⁰⁾ **Distress warrants—preceding sections apply to.** The preceding provisions of this chapter shall also apply to proceedings upon distress warrants levied or about to be levied upon personal property claimed by any person other than the tenant, his assignee or under-tenant; except that in such case the bond of the claimant of the property, if it exceed the value of fifty dollars, shall be returned to the circuit court of the county, and the motion thereon shall be made in that court; and, if the value of the property do not exceed fifty dollars, the bond shall be returned to some justice of the peace of the county, and the motion may be made before him. Indemnifying bonds in such cases shall be returned with the warrants under which they were taken. (*Tenant may sue plaintiff in warrant to recover property taken by officer, sec. 33; form of distress warrant, page 642.*)

§ 653 ⁽⁷²¹⁾ **Tenant may give bond and discharge levy—appraisement.** If an officer levy or be about to levy a distress warrant upon any property, the tenant, his assignee or under-tenant may execute, with one or

§ 652. See notes to secs. 641, 643, 645 and 648.

§ 653. (1) **Bond—estoppel.** A defendant in a distress warrant who executes the bond authorized by this section is estopped from denying that he is tenant, assignee or under-tenant. *Pegard v. Kellar*, 4 Met. 260.

(2) **Bond that may be executed.** There is only one mode in which a tenant or under-tenant may discharge the levy of a distress warrant upon his property, and that is by executing the bond provided for in this section. Where a tenant executed the bond provided in sec. 645, it could not be enforced by motion, did not

more sufficient sureties, to be approved by the officer, a bond to the party in whose favor the warrant issued, to the effect that he will pay to such party the amount of the rent specified in the warrant, with ten per cent thereon, if the property be of the value of the rent so specified; or, if it be of less value, that he will pay to such party the value thereof, and ten per cent thereon. For the purpose of taking this bond the officer shall cause the property to be appraised as is provided in section six hundred and forty-six. The appraisement shall be annexed and referred to in the bond. Upon the giving of the bond, the levy, if one have been made, shall be discharged, and the bond and warrant shall be returned to some justice of the peace of the county, if the amount claimed do not exceed fifty dollars; and, if it exceed that sum, to the clerk's office of the circuit court of the county. (*Form of bond and appraisement, pages 642, 643.*)

§ 654 (722) **Motion by plaintiff for judgment—defenses allowed.** The party to whom the bond is executed may move the justice of the peace or the court for a judgment thereon against all or any of the obligors or their representatives, having given to them five days' notice of the motion. The defendants may make defense upon the ground that the distress was for rent not due in whole or in part, or was otherwise illegal; or, if the property was levied upon, that it was by statute exempt from the levy; and may make any defense, by way of set-off or counter-claim, that is allowed by the Code in actions.

§ 655 (723) **Trial of motion by justice—appeal.** If the motion be made before a justice of the peace, he shall cause a jury to find the facts, subject to an appeal if the amount exceed ten dollars.

§ 656 (724) **Trial of motion in court.** If the motion be made in court, it shall direct a jury to find the facts.

§ 657 (725) **Judgment for rent and damages—execution.** If the judgment be against the defendants, it shall be for the rent due and ten per cent thereon, not exceeding the amount secured by the bond. An execution may be issued forthwith.

§ 658 (726) **Tenant may in part suspend warrant by bond.** If the tenant, his assignee or under-tenant contend that a part of the rent is not due, he may suspend the distress warrant for such part by giving bond, with good surety, for it—upon which proceedings may be taken as is prescribed in the preceding sections.

discharge the levy, and the officer had a right to retake and sell the property under the warrant. *Grubb v. McCoy*, 2 Met. 486.

(3) **Distress warrant may be replevied.** A distress for rent may be replevied. Ky. Stat., sec. 2310; *Dean v. Ball*, 3 Bush 502.

§ 654. See notes to sec. 648.

§ 659 [737] **Ancient trial of right of property abolished.** Trials by juries summoned by sheriffs or other officers, of the right of property taken by them under execution or distress warrant, are abolished.

§ 660. **Execution levy on joint property—proceedings.** If an officer levy an execution upon personal property held by the execution debtor jointly with another person—

1. The officer shall not deprive such person, without his consent in writing, of the possession of the property, except for the purpose of having it inventoried and appraised, which he shall cause to be done pursuant to the provisions of section six hundred and forty-six.

2. The officer shall return the inventory and appraisement, with the execution, to the office from which it issued; and shall state in his return the facts connected with the levy, and the claim of the joint owner.

3. The execution creditor shall have a lien upon the property levied on, such as is given by law to an execution in the hands of an officer; and, upon the aforesaid return, the creditor may enforce said lien by an action in equity.

4. If such creditor, at the commencement of his action or afterward, shall file an affidavit that he verily believes the property levied upon will be removed from the county or sold or otherwise disposed of with intent fraudulently to defeat his lien, the court, or the circuit judge thereof in vacation, or the presiding judge of the county court, may make an order directing the officer to possess himself of the property so levied upon, unless bond, with approved security, shall be executed to the plaintiff in the execution, binding the obligors in said bond to have the same forthcoming in obedience to any order or judgment of the court in the action—which bond shall be taken by the officer and returned by him to the court in which the action is pending.

§ 660. (1) **Joint property—how subjected.** A bond executed by one joint owner to suspend the sale of an interest in joint property, which was levied on under an execution against the other joint owner, is not obligatory. No sale of the property could have been made under the execution. The levy only gave to the creditor a lien, which he could en-

force in equity. *Vicory v. Strausbaugh*, 78 Ky. 425.

(2) **Partnership property.** When partnership property has been levied on to satisfy an execution against one of the partners, a settlement of the partnership affairs should be made, and only the interest of the execution defendant subjected. *Williams v. Smith*, 4 Bush 540.

CHAPTER VII.

PROCEEDINGS BY SURETIES.

[SEE FURTHER, AS TO SURETIES, KY. STAT., SEC. 4659.]

§ 661. Surety may sue principal or co-surety after debt matures.

§ 662. Mode of proceeding—provisional remedies.

§ 661 [735] **Surety may sue principal or co-surety after debt matures.** After the maturity of a debt or liability, an equitable action may be brought by a surety against his principal to compel payment of it, or by one who is jointly liable therefor with another to compel him to pay so much of it as he may be equitably liable for as between him and the plaintiff. (*Action before debt due, secs. 237 to 248; when may proceed by motion, sec. 444.*)

§ 662 [736] **Mode of proceeding—provisional remedies.** 1. The creditor must be made defendant to an action brought pursuant to section six hundred and sixty-one, but shall not be liable for costs.

2. The provisions of chapter one, and of articles one and four of chapter three, of title eight, shall apply to such action, except so far as they are modified by section two hundred and forty-four, section two hundred and forty-five, subsections one and two of section two hundred and forty-seven, and section two hundred and forty-eight, which are also made applicable to such action; and except, also, that the affidavits mentioned in section one hundred and fifty-three and section one hundred and ninety-six, instead of stating the sum which the affiant believes the plaintiff ought to recover, shall state the sum which the affiant believes the defendant ought to pay.

§ 661. (1) **Indorser against prior indorser.** An action by the second indorser of a bill of exchange against the first indorser is substantially an action by a surety against his principal for indemnity. *Scott v. Doneghy*, 17 B. M. 321.

(2) **Limitation.** A surety against whom a judgment is obtained, and who pays the debt, can not require his co-surety to contribute, if at the rendition of the judgment an action on the note against the co-surety would be barred by limitation. *Shelton v. Farmer*, 9 Bush 314; *Cochran v. Walker*, 82 Ky. 220.

(3) **Principal must be insolvent.** An ac-

tion can not be maintained by one surety against a co-surety to recover money paid for their principal unless the principal is insolvent. *Bolling v. Doneghy*, 1 Duv. 220; *Lee v. Forman*, 3 Met. 114.

(4) **Surety—payment by—what is.** When one surety executes his note to the creditor in discharge of their obligation, his cause of action against his co-surety for contribution accrues. *Stubbins v. Mitchell*, 82 Ky. 535.

(5) See further, as to sureties and co obligors, Ky. Stat., sec. 4659.

§ 662. (1) **Pleadings — affidavit.** The affidavit should state the amount the

TITLE XV.

GENERAL PROVISIONS.

- CHAPTER I. PROCESS, 663.
 II. DUTIES OF CLERKS, 669.
 III. DUTIES OF SHERIFFS, 674.
 IV. MISCELLANEOUS PROVISIONS, 678.

CHAPTER I.

PROCESS.

- § 663. Not to issue before petition filed.
 § 664. Holiday—process may issue and bond be taken on.
 § 665. Holiday or Sunday—issuance and execution of process on.
 § 666. Defendant, when privileged from service.
 § 667. Officers to whom process may be directed.
 § 668. Court may appoint person to execute.

§ 663 [731] **Not to issue before petition filed.** No summons, nor order for a provisional remedy, shall be issued by the clerk in any action, before the plaintiff's petition therein is filed in his office.

§ 664 [732] **Holiday—process may issue and bond be taken on.** It shall be no objection to any process, writ, summons, affidavit or order for a provisional remedy that it was issued, made or dated on a holiday; nor shall it be an objection to any bond given by or for any party to an action, or taken by an officer in the course of the same, that it was made or dated on any such day. (*What is "process"—"writ," sec. 732-26, 27; holidays, see Ky. Stat., sec. 2089.*)

§ 665 [732, 734, 735] **Holiday or Sunday—issuance and execution of process on.** A summons, subpoena, notice or order for a provisional remedy may be issued, given or executed on a holiday or Sunday, if the officer or person having the notice or process believe, or if the plaintiff or some other person make affidavit to the effect that the affiant believes, that the notice can not be given, or that the process can not be executed, after such holiday or Sunday. (*Holidays, see Ky. Stat., sec. 2089.*)

principal ought to pay and that it is just, and the attachment should be issued by the clerk. *Meyer v. Ruff*, 13 R. 254.

(2) It is held in *Bamberger v. Moayon*, 91 Ky. 517, that the creditor in a proceeding under sec. 237 is a necessary party, but failure to make him a party does not render attachment void.

§ 664. (1) **Distinction between holiday and Sunday**, see *Moore v. Hagan*, 2 Duv. 437.

(2) **Holidays are** January 1, February 22, May 30, July 4, Thanksgiving Day; December 25. *Ky. Stat., sec. 2089.*

(3) **Process may be executed on holiday**, but if motion is made to quash process because of its execution on a holiday,

§ 666 [736] **Defendant when privileged from service.** Subject to the provisions of section five hundred and forty-two, the defendant shall have no privilege of exemption from the service of the process mentioned in section six hundred and sixty-five, except from an arrest, by reason of his attendance at any muster, election or order of survey, or as a witness at any court or other place.

§ 667 [66, 737] **Officers to whom process may be directed.** 1. Every process in an action or proceeding shall be directed to the sheriff of the county; or, if he be a party, or be interested, to the coroner; or, if he be interested, to the jailer; or, if all these officers be interested, to any constable.

2. The summons or an order for a provisional remedy, in an action or proceeding, may, at the request of the party in whose behalf it is issued, be directed to any of the officers named in the first subsection who is not a party to nor interested in the action. (*Elisor may perform duties of sheriff, Ky. Stat., sec. 1597; sheriff may appoint bailiff, Ky. Stat., sec. 4562.*)

§ 668 [738] **Court may appoint person to execute.** The court, for good

burden is on plaintiff to show necessity for its service on that day. *Paul v. Bruce*, 9 Bush 317.

§ 667. (1) **Attachment—by whom to be executed.** An attachment must be executed by the officer to whom it is directed, and can not, like a summons, be executed by an officer to whom it might have been directed. *Menderson v. Specker*, 79 Ky. 509.

(2) **Deputy—execution of process by.** See notes to sec. 678.

(3) **Execution** must be executed by officer to whom it is directed. *Johnson v. Elkin*, 90 Ky. 163.

(4) Execution must be directed to and executed by the sheriff, unless he be a party or interested. If he is interested or a party, then it must be directed to the coroner; if he is a party or interested, to the jailer; and if he is interested or a party, then to a constable, but none of the above mentioned officers can execute writ except in the order named; nor unless one first authorized to execute it is disqualified. *Gowdy v. Sanders*, 88 Ky. 347.

(5) **Plaintiff's right to have process directed.** The plaintiff has an unlimited right to have his original process direct-

ed at his option to any of the officers authorized to execute it. *Boaz v. Nail*, 2 Met. 245.

(6) **Presumption that officer did his duty.** It will be presumed that an officer did his duty, and executed process as the law requires it to be done, unless the process shows that he did not. *Webber v. Webber*, 1 Met. 18; *Case v. Colston*, 1 Met. 145; *Lewis v. Quinker*, 2 Met. 284; *Anderson v. Sutton*, 2 Duv. 480; *Thomas v. Mahone*, 9 Bush 111. But this presumption does not arise when the process has been executed by a special bailiff. *Lloyd v. McCauley*, 14 B. M. 535; and see notes to sec. 48.

(7) **Summons—service of by officer interested void.** Judgment in an action in which the sheriff is plaintiff, although not pecuniarily interested, upon summons executed by him, is void. *Knott v. Jarboe*, 1 Met. 504.

(8) **Summons—who may execute.** A summons directed to the sheriff may be executed by a constable, or any officer to whom it might have been directed. Sec. 47; *Long v. Gaines*, 4 Bush 353.

§ 668. **Special bailiff appointed by court** to execute a summons must reside in the county in which the defendant is sum-

cause, may appoint a person to serve a particular process or order, and he shall have the same power to execute it which a sheriff has. His return must be verified by his affidavit. He shall be entitled to the fees allowed to sheriffs for similar services.

CHAPTER II.

DUTIES OF CLERKS.

[SEE FURTHER, AS TO DUTIES OF CLERKS, KY. STAT., SEC. 372.]

- § 669. Indorsement to be made on papers.
- § 670. Return on summons to be entered—effect of.
- § 671. Oaths administered—affidavits—orders of survey.
- § 672. Bonds prepared by.
- § 673. Surety insufficient refused.

§ 669 ^[739] **Clerk to indorse time of filing papers and return of bonds.** The clerk shall indorse, upon every paper filed in an action, the day of filing it; and, upon every order for a provisional remedy, and every bond taken thereunder, the day of its return to his office. (*Deputy may act for, sec. 678.*)

§ 670 ^[740] **Return on summons to be entered—effect of.** He shall, upon the return of a summons served, enter in full upon the docket the return of the officer executing the summons. The entry shall be evidence of the service of the summons, if it should be lost.

§ 671 ^[741] **Oaths administered—affidavits—orders of survey.** He may administer any oath or take any affidavit required or permitted in the progress of an action; and shall make orders of survey, during

moned. A special bailiff residing in one county can not be appointed to serve a summons in another county. *Lillard v. Brannin*, 91 Ky. 511.

§ 669. **Clerk—deputy.** A minor may be appointed deputy clerk. *Talbott v. Hooser*, 12 Bush 408.

§ 670. (1) **Summons—entry of return on.** The entry by the clerk of the service of process is only evidence when the process is lost. A statement in the judgment that summons has been executed is no evidence of that fact. *Robinson v. Mobley*, 1 Bush 190.

(2) **Summons having been lost clerk's entry of return copied from return on**

summons is entitled to more weight than the recollection of defendant and officer executing. *Lemming v. Mullins*, 6 R. 523.

§ 671. (1) **Execution—error in fixing return day.** An execution is not void because of an error of the clerk in fixing the return day, nor is the clerk liable for making the execution returnable in less time than that fixed by law. *Goode v. Miller*, 78 Ky. 235.

(2) **Negligence—liability for.** A circuit clerk is not liable for the loss of a debt resulting from his failure to enter a judgment, unless the omission was caused by his gross negligence or fraud. *Com. v. Thompson*, 2 Bush 550.

vacation, upon the application of any party, after service of process, and shall indorse the same on the petition, noting the date thereof and the party for whom it was made; and said orders of survey shall have the same effect as if made by the court, if the party obtaining the order give to his adversary notice that the order has been made and of the time when it is to be executed.

§ 672 [742] **Bonds prepared by.** He shall prepare in a proper manner every bond to be taken by or given before him or his court.

§ 673 [743] **Surety insufficient refused.** He shall refuse any surety offered in a bond to be taken by him who is, in his opinion, insufficient. (*Sureties may be sworn; qualifications of, secs. 683, 684.*)

CHAPTER III.

DUTIES OF SHERIFFS.

§ 674. Time of receiving process to be indorsed.

§ 675. Buildings may be entered or broken, when.

§ 676. Buildings may be entered or broken to execute order of arrest.

§ 677. "Prevented by force" not sufficient return.

§ 674 [744] **Time of receiving process to be indorsed.** The sheriff shall indorse upon every summons, order of arrest or for the delivery of property, or of attachment, or injunction, in his hands, the day and hour of its reception by him. (*What officers word "sheriff" embraces, secs. 732-15.*)

§ 675 [745] **Buildings may be entered or broken to execute process—when.** A sheriff having an order of attachment, or for the delivery of property, may enter any building or inclosure containing the property, to take it;

(3) **Not authorized to receive money.** Circuit clerks, in their official capacity, are not authorized to receive money upon judgments, executions or replevin bonds. *Durant v. Gabby*, 2 Met. 91; *Chinn v. Mitchell*, 2 Met. 92.

(4) **Transcripts—rights and duties of clerk.** The Court of Appeals has the power to compel clerks to deliver transcripts of records to the party desiring to appeal without the payment, or security for the payment, of the fees therefor, and the fact that the party is insolvent, and can not secure the fee, will not authorize the clerk to refuse to make out the tran-

script. But if the litigant is able to pay, although legally insolvent, the clerk will not be required to deliver the transcript without payment of fees. *Duncan v. Baker*, 13 Bush 514; *Bates v. Foree*, 4 Bush 430; *Collins v. Cleveland*, 17 B. M. 459; and see *Houston v. Ducker*, 86 Ky. 123.

(5) **Liability of clerk for failing to furnish transcript.** See *Houston v. Wandelohr*, 12 R. 345.

§ 672. **Appeal bonds—duty to prepare.** It is the duty of the clerk of the court to which an appeal is taken to prepare the appeal bond. *Adams v. Settles*, 2 Duv. 76.

and, if necessary for this purpose, may break the building or inclosure, having first publicly demanded the property. (*See further as to powers of sheriff, Ky. Stat., sec. 4582.*)

§ 676 ^[746] **Buildings may be entered or broken to execute order of arrest.** A sheriff having an order of arrest may enter any house or inclosure in which the party to be arrested may be, to arrest him; and, if necessary for this purpose, may break the house or inclosure, after having informed any person therein of his object; or, if no person appear to whom such information can be given, after having publicly demanded the person to be arrested; and, in either case, after having given sufficient time for the house or inclosure to be opened. (*See further as to power of sheriff, Ky. Stat., sec. 4582.*)

§ 677 ^[747] **"Prevented by force" not sufficient return.** It shall not be a sufficient return of any process, that the officer was prevented by force from executing it.

CHAPTER IV.

MISCELLANEOUS PROVISIONS.

- § 678. Deputy of ministerial officer may act for him.
- § 679. Authority conferred on several—majority may act.
- § 680. Affirmation may be substituted for oath.
- § 681. Mode of counting days between acts.
- § 682. New bond may be executed for defective one.
- § 683. Surety may be sworn as to his sufficiency.
- § 684. Qualifications of sureties.
- § 685. Discovery—action for and requisites of petition.
- § 686. Successive actions allowed on same contract.
- § 687. Actions unnecessarily multiplied, plaintiff to pay costs.
- § 688. Writ of *ne exeat* abolished.
- § 689. Provisional remedy—when two justices may grant.
- § 690. Execution of attachment bond enters appearance.
- § 691. Unknown defendant—how described in petition.
- § 692. Other liens to be stated in action to enforce lien—cross petition.
- § 693. Action against surety after bankruptcy of principal.

§ 676. (1) **Sheriff—powers of.** A sheriff, having a writ of arrest, has authority for the purpose of executing it at any time, whether night or day, to break into any house or inclosure, first having given the proper notice of the writ and his purpose to execute it. *Phillips v. Ronald*, 3 Bush 244.

(22)

(2) A constable, having in his hands a distress warrant to execute, is not authorized to force a lock of an outer door, nor to unlatch, nor to loose, the fastening of a window-shutter of an outer window to enter the house to make a levy. *Jewell v. Mills*, 3 Bush 62.

- § 694. Provisions as to sale of real property—indivisible property—other liens.
- § 695. Indivisible personalty may be sold—payment of excess.
- § 696. Time, place and terms of sale of property.
- § 697. Bond of purchaser and effect of—interest on.
- § 698. Purchaser of personalty—when entitled to it.
- § 699. Lien retained on real property sold—how released.

§ 678 (749) **Deputy of ministerial officer may act for him.** Any duty enjoined by this Code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy.

§ 679 (750) **Authority conferred on several, majority may act.** An authority conferred by law upon three or more persons may be exercised by a majority of them concurring; and an act directed by law to be done by three or more persons may be done by a majority of them concurring.

§ 680 (751) **Affirmation may be substituted for oath.** An oath required by this Code may be substituted by the affirmation of a person who is conscientiously opposed to taking an oath.

§ 681 (752) **Mode of counting days between acts.** If a certain number of days be required to intervene between two acts, the day of one only of the acts may be counted.

§ 682 (753) **New bond may be executed for defective one.** If a bond provided for by this Code be adjudged to be defective, a new and sufficient one may be executed in such reasonable time as the court may fix, with the same effect as if originally executed.

§ 678. (1) **Ministerial officer—deputy.** A deputy marshal of the Louisville Chancery Court can appoint a special bailiff to execute a summons. *Norman v. Norman*, 6 Bush 495; and a minor may be appointed deputy clerk. 12 Bush 408.

(2) The proper rule is for the deputy to sign the name and official character of the principal by himself as deputy, but the omission to sign the name of the principal will not invalidate the return. *Humphrey v. Wade*, 84 Ky. 391. See *Talbott v. Hooser*, 12 Bush 408; 6 Bush 495.

(3) See further, notes to secs. 47 and 48, as to execution and return of process, and Ky. Stat., secs. 4560, 4562, as to appointment of special bailiffs and deputies by sheriffs.

§ 679. **Majority of persons** directed by law to do a certain thing may act unless by express words or by implication a contrary intention appears. *Hewitt v. Craig*, 86 Ky. 23.

§ 680. **Corporal oath** synonymous with solemn oath. *Com. v. Jarboe*, 89 Ky. 143.

§ 681. **Time—how computed.** "The rule is well settled that where the computation is to be made from the act done then the day on which it is done must be included, but if to be made after or from the day itself, the day must be excluded." *Moar v. Cov. Bank*, 80 Ky. 305; *Chiles v. Smith*, 13 B. M. 461; *Handley v. Cunningham*, 12 Bush 401; *Wood v. Com.*, 11 Bush 220.

§ 682. (1) **Defective bond.** A traverse bond being defective in limiting the cost and damage to which the traverser might be subjected to one hundred dollars, the court should have permitted a new bond to be executed. *Alderson v. Trent*, 79 Ky. 259.

(2) If a party desiring to appeal attempts in good faith to execute a bond, and does execute such a bond as is prepared for him by the clerk, and it is de-

§ 683 ⁽⁷⁵⁴⁾ **Surety may be sworn as to his sufficiency.** An officer whose duty it is to take a surety in any bond provided for by this Code may require the person offered as surety to make affidavit of his qualifications, which affidavit may be made before such officer. The taking of such an affidavit shall not exempt the officer from any liability to which he might otherwise be subject for taking insufficient security. (*Form of affidavit, page 629; may refuse insufficient, sec. 673.*)

§ 684 ⁽⁷⁵⁵⁾ **Qualifications of sureties.** The surety in every bond provided for by this Code must be a resident of this State, and be worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this State equal to the sum to be secured. If there be two or more sureties in the same bond they must, in the aggregate, have the qualifications prescribed in this section.

§ 685 ⁽⁷⁵⁶⁾ **Discovery—action for and requisites of petition.** No action for a discovery shall be brought, except that, if any person be liable, jointly or severally with others, upon the same contract, an action may be brought against any of them to obtain discovery of the names and residences of the others who are also liable. The petition must be verified, and must state that the plaintiff has used due diligence to obtain the information asked to be discovered, and that he does not believe that the persons liable upon the contract, who are known to him, have property sufficient to satisfy his claim. The plaintiff must pay the cost, unless the discovery be resisted. (*As to action for discovery after return of "no property," see sec. 439.*)

§ 686 ⁽⁷⁵⁷⁾ **Successive actions allowed upon same contract.** Successive actions may be maintained upon the same contract or transaction, if, after the former action, a new cause of action have arisen therefrom.

§ 687. **Actions unnecessarily multiplied, plaintiff to pay costs.** In actions which are unnecessarily multiplied by the plaintiff against one or more persons, the plaintiff, though successful, must pay the costs.

fective, he should be allowed to execute a new bond. *Adams v. Settles*, 2 Duv. 76; *Watters v. Patrick*, 1 Bush 223; *Manier v. Lindsey*, 3 Bush 94.

(3) Where the appellant and his surety signed their names to a blank paper, with authority to the clerk to write their names above the signatures, which he failed to do, the appeal was properly dismissed; a new bond could not be executed. *Hargis v. Pearce*, 7 Bush 234.

(1) An attachment bond not taken by the clerk nor in the manner prescribed is not a defective bond that can be remedied or substituted by a new one. *Horne v. Mitchell*, 7 Bush 131.

§ 685. **Bill of discovery** may be brought to compel the production of books or papers necessary in the preparation of a suit by one who has an interest in them. *Marion Nat. Bank v. Abell*, 88 Ky. 428.

§ 688 [758] **Writ of ne exeat abolished.** The writ of *ne exeat*, as a remedy in a civil action, is abolished.

§ 689 [759] **Provisional remedy—when two justices may grant.** If, pursuant to this Code, a provisional remedy may be granted by the judge of the court in which the action is brought, or the presiding judge of the county court, it may be granted by any two justices of the peace of the county, if said judges be absent therefrom and such absence appear by affidavit.

§ 690 [761] **Execution of attachment bond enters appearance.** In an action in which an attachment has been granted, the execution by or for the defendant of a bond whereby the attachment is discharged, or the possession of the attached property is obtained or retained by him, shall be an appearance of such defendant in the action.

§ 691. **Unknown defendant—how described in petition.** In an action against a person whose name is unknown to the plaintiff—

1. He shall be described in the petition and process as unknown defendant.

2. If his name and place of residence, or either, be discovered by the plaintiff, pending the action, the petition shall be amended accordingly.

3. If his name and place of residence be unknown to the plaintiff, he shall be subject to, and be entitled to, the benefit of the provisions of this Code concerning non-residents of this State.

§ 692. **Other liens to be stated in action to enforce lien—cross-petition.** The plaintiff in an action for enforcing a lien on property shall state in his petition the liens held thereon by others, making them defendants; and may ask for and obtain a judgment for a sale of the property to satisfy all of said liens which are shown to exist, though the defendants fail to assert their claims. Such defendants shall not, however, be allowed to withdraw or receive any of the proceeds of such sale, until they have shown their right thereto by answer and cross-petition. But unless a personal judgment be prayed for in such cross-petition, there need not be any summons thereon; and it shall be treated with reference to the time of answering thereto, as a set-off or counter-claim. (*See further, sec. 694, subsec. 3.*)

§ 693. **Action against surety after bankruptcy of principal.** In an action for the recovery of money in which the defendant may have given bond

§ 690. **Appearance**—see as to acts that will enter, notes 1-4, page 222, and note 4, page 43.

§ 692. **Mortgagee is not required to make**

a creditor who has no lien a party to the action. *McMurtry v. the Montgomery M. T. Co.*, 86 Ky. 206.

(2) See further, notes 3-5, 12-20, sec. 694.

with sureties, or for whom sureties may have given bond, pursuant to the provisions of sections fourteen, two hundred and fourteen, two hundred and twenty-one, or two hundred and fifty-eight; or in which an appellant may have given bond with sureties, or for whom sureties may have given bond, pursuant to the provisions of section seven hundred and twenty-four or section seven hundred and forty-eight—if such defendant or appellant have thereafter become a bankrupt under the laws of the United States, upon notice thereof from his adversary being served on the sureties, pursuant to the provisions of chapter two of title four, concerning the service of a summons, the court shall decide whether or not anything, and, if anything, how much, should have been adjudged against the defendant or appellant, but for the bankruptcy; and such decision shall be conclusive as to the liability of the sureties; but they shall not be liable upon a bond given pursuant to section two hundred and fourteen, if property released from an attachment by reason thereof, or its proceeds, have lawfully come to the defendant's or appellant's assignee in bankruptcy.

§ 694 (322, 405) **Provisions as to sales of real property—indivisible property—other liens.** 1. Before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of the parties, by affidavits filed or by a report of a commissioner or commissioners, whether or not the property can be divided without materially impairing its value; and may cause it to be divided, with suitable avenues, streets, lanes or alleys; or without any of them.

2. If it be necessary to sell, for the payment of debt, a parcel of real property which can not be divided without materially impair-

§ 694. (1) **Appraisalment of land** before sale, Ky. Stat., sec. 2302; and a sale under decree will be set aside in the absence of a valid appraisalment, and there can not be a valid appraisalment unless appraisers are sworn by some person authorized to administer an oath. Phelps v. Jones, 91 Ky. 244.

(2) **Appraiser of land may purchase** it in the absence of any facts showing that he contemplated purchasing when appraisalment was made. Ison v. Kinnaird, 13 R. 589; Barlow v. McClintock, 10 R. 394; see further, notes 7-14, sec. 696.

(3) **Averment that land is divisible not necessary.** It is not necessary to allege in the petition that the property is divisible or indivisible; if the court is satisfied from the character of the boundary, or

the number of acres in the tract as described in the pleadings, that a division can be had of the land, it is all that is required. Sears v. Henry, 13 Bush 413.

(4) **Allegation or proof as to divisibility** is unnecessary if the petition so describes the land as to enable the court to determine whether or not it can be divided without impairing its value. Cockrill v. Mize, 11 R. 637; Lucy v. Hopkins, 11 R. 907; McFarland v. Garnett, 10 R. 91; and where petition states that land is divisible, judgment directing sale of entire tract will not be reversed, where no one is prejudiced. Fowler v. Kallam, 4 R. 988.

(5) **Defect in title—how averred.** When a vender sues to enforce an executory contract for the sale of land, averring

ing its value, the officer shall sell the whole of it, though it bring more than the sum to be raised; and the court shall make proper orders for the distribution of the proceeds.

3. The plaintiff in an action to enforce a lien on real property shall state in his petition the liens, if any, which are held thereon by others, and make the holders defendants; and no sale of the property shall be ordered by the court prejudicial to the rights of the holders of any of the liens; and when it appears from the petition or otherwise, that several debts are secured by one lien, or by liens of equal rank, and they are all due at the commencement of the action, or become so before judgment, the court shall order the sale for the *pro rata* satisfaction of all of them; but if, in such case, the debts be owned by different persons and be not all due, the court shall not order a sale of the property until they all mature. If all such liens be held by the same party, the court may order a sale of enough of the property to pay the debts then due, unless it

that he is able, ready and willing to convey the title and tenders a conveyance, the vendee must either aver that the vender has no title, or if the title is defective, he must point out the defects. *Logan v. Bull*, 78 Ky. 607; *Collins v. Park*, 93 Ky. 6; and see note 20.

(6) **Equity of redemption** may be sold to satisfy balance of judgment when the land has not sold for two-thirds of its appraised value. *Crittenden v. Beck*, 10 R. 322; Ky. Stat., sec. 2365.

(7) Where a purchaser at judicial sale, whether he be the defendant or a stranger, fails to pay his sale bonds and the land is again sold, he has no right to redeem land from second sale. *McKee v. Stein*, 91 Ky. 240.

(8) Where the land is redeemed by the debtor the plaintiff can not afterward have an order of resale to satisfy the unpaid portion of his judgment. *Makibben v. Arndt*, 88 Ky. 180.

(9) Redemption right of defendant. Ky. Stat., sec. 2362.

(10) **Fees of commissioner** for making sales and collecting and paying out money. Ky. Stat., sec. 1740; judgment should allow fees. *Wade v. Cov. City Bank*, 2 R. 231.

(11) **Interest may be computed** on principal to date of judgment, and judgment be rendered for aggregate amount with

interest thereon. *Turpin v. Turpin*, 4 R. 438; Ky. Stat., sec. 2220.

(12) **Lien notes not all due.** In an action to enforce a vender's lien, if some of the notes are not due and it appears from the petition that the property is not susceptible of advantageous division, no part of it should be sold until all the notes fall due, although they are all held by the same person. *Leopold v. Furber*, 84 Ky. 214; *Faught v. Henry*, 13 Bush 471; *Gentry v. Walker*, 93 Ky. 405; see further, note 21.

(13) Allegation that a sale at once of the entire tract was necessary to prevent loss to the creditor did not authorize a sale to pay notes not due. *Burton v. McKinney*, 6 Bush 428.

(14) Where the plaintiff held two notes, one of which was not due, it was erroneous to order a sale of the land to pay the note due, subject to a lien for the note not due. *Eminson v. Risque*, 9 Bush 24.

(15) Where several lien notes are held by same party, sale of enough land to pay those due may be ordered unless it appears land is not susceptible of advantageous division, or for other reasons a sale would cause a sacrifice. *Ward v. Coffey*, 11 R. 339.

(16) When all the notes are executed to the plaintiff, the presumption is that

appear that it is not susceptible of advantageous division; or that, for some other reason, the sale would cause a sacrifice thereof, or seriously prejudice the interests of the defendants.

§ 695. Indivisible personalty may be sold—payment of excess. If it be necessary to sell, for payment of debt, one or more parcels of personal property which, in the opinion of the officer making the sale, can not be divided without materially impairing the value thereof, he shall sell the whole of said property, though it bring more than the sum to be raised; but he shall have no commission on the excess. The excess shall be paid to the defendant, or the bond therefor shall be payable to him.

§ 696. Time, place and terms of sale of property. Every sale made under an order of court must be public, upon reasonable credits to be fixed

he is the owner of the notes not due, and it is not necessary to allege that he has not parted with them. *Ward v. Coffey*, 11 R. 339.

(17) **Parties.** A sale of land under an attachment subject to the vender's lien without making the vender a party is erroneous. *Mills v. Brown*, 2 Met. 404.

(18) **Personal judgment.** Where the vender seeks both a personal judgment and an enforcement of his lien, he is entitled to a personal judgment if allegations of petition authorize it, although he may not be entitled to an enforcement of his lien. *Bullock v. Graham*, 87 Ky. 120; and a personal judgment may be rendered, although defendant is not summoned in county where action is pending. *Collins v. Park*, 93 Ky. 6.

(19) **Pleading.** Allegation that lien was reserved on land to secure payment of note, averred to have been executed for purchase money, is unnecessary. *Cockrill v. Mize*, 11 R. 637; see further, note 3.

(20) The plaintiff should set out the contract, and if he has not already conveyed must state the character of title that he agreed to make and that he is ready and willing to make it; if he has conveyed the land he should state the fact. *Bullock v. Graham*, 87 Ky. 120; *Calvin v. Duncan*, 12 Bush 101; see further, note 5.

(21) **Sale of enough land to pay uncontested part of note error.** Where a part of a lien note is contested, it is error to sell enough of the land to pay the uncon-

tested part, unless the plaintiff waives his lien as to the contested part; but a personal judgment is proper. *Sears v. Henry*, 13 Bush 413; see further, note 12.

§ 696. (1) Advertisement of sale. If the commissioner fails to advertise the sale of land as directed in the judgment, and the land is sold for less than its value, the sale will be set aside on motion of the defendant. *Williams v. Woodruff*, 1 Duv. 257.

(2) A sale advertised to take place at 1 o'clock was set aside because made before that time, it appearing that the property brought less than its value, and that persons who desired to bid for it and pay its value were present at the hour advertised. *Williams v. Jones*, 1 Bush 621.

(3) The presumption is that commissioner performed properly his duty in advertising land, but this presumption is rebutted when he does not personally know how land was advertised. *Harris v. Gunnell*, 10 R. 419; *Zazio v. Samuels*, 4 R. 987.

(4) Commissioner should post advertisements himself or should be able to state that property was properly advertised; the practice of getting others to post advertisements is condemned. *Price v. Simpson*, 8 R. 327.

(5) **Appeal may be taken** by purchaser from judgment setting aside sale, although land is worth less than one hundred dollars. *Hughes v. Swope*, 88 Ky. 254; and see further, notes to sec. 734.

by the court, not less, however, than three months for personal, nor six months for real, property; and shall be made after such notice of the time, place and terms of sale as the order may direct; and, unless the order direct otherwise, shall be made at the door of the court-

(6) **Attorney in case** can not act as commissioner in selling land in same case. *Adkinson v. Randle*, 93 Ky. 310.

(7) **Appraisement.** It is not necessary that appraisers should go upon the property to appraise it if they have such knowledge of it as enables them to fix its value. *Zabel v. Masonic Bank*, 13 R. 197.

(8) The court will presume that appraisers performed in a proper manner their duties. 13 R. 197.

(9) An appraiser is not disqualified from purchasing the land at the sale. *Ison v. Kinnaird*, 13 R. 569.

(10) Failure to have land appraised is ground for setting sale aside, and the court will not inquire whether or not property brought two-thirds of its value; nor can debtor waive the failure to have property appraised to the injury of creditors who might have equity of redemption sold. *Cantrill v. Perry*, 7 R. 446.

(11) Mere error of judgment on part of appraisers is not sufficient to set sale aside. *Harris v. Gunnell*, 10 R. 419; unless it appears that the valuation was procured by fraud or resulted from mistake other than the mere judgment of the appraisers. *Lawrence v. Edelen*, 6 Bush 55; *Knight v. Whitman*, 6 Bush 51; *Vallandingham v. Worthington*, 85 Ky. 83.

(12) Appraisement is only necessary when land is sold for payment of debts. *Graves v. Long*, 87 Ky. 441; *Wooldridge v. Jacob*, 79 Ky. 250; *Southwick v. Gruzenbach*, 12 R. 263.

(13) Appraisers must be sworn by some person authorized to administer an oath, or appraisement will be void. As to right of special commissioner to administer an oath. *Phelps v. Jones*, 91 Ky. 244.

(14) See Ky. Stat., sec. 2362, for provisions as to appraisement.

(15) **Conduct of sale.** Time allowed to execute bonds is a matter very largely in the discretion of the commissioner. *Hughes v. Swope*, 88 Ky. 254; and see *Passmore v. Moore*, 15 R. 107.

(16) Commissioner is bound to accept all bids and sell the property to the highest bidder, giving him reasonable time to execute bond. *Morton v. Moore*, 4 R. 717.

(17) Where commissioner, after he has knocked off property, discovers that he has made a mistake, he may at once resell the property. *Head v. Clark*, 88 Ky. 362.

(18) Although the judgment did not direct the commissioner to sell the land subject to the wife's contingent right of dower, the commissioner properly sold it in that way. *Robinson v. Robinson*, 11 Bush 174.

(19) Even where the judgment falls to so direct, the commissioner should offer to sell less than the entire property if it is susceptible of division. *McLaughlin v. Schneid*, 11 R. 648.

(20) In advertising the land and conducting the sale, the commissioner should follow the directions of the judgment. *Jarboe v. Colvin*, 4 Bush 70; *Hahn v. Pindell*, 1 Bush 538.

(21) The judgment failed to designate the place of sale, and the commissioner sold the property at a place some miles from the court-house. The sale having been reported and confirmed was not void, however erroneous it might have been. *Revill v. Claxon*, 12 Bush 558. See *Dawson v. Litsey*, 10 Bush 408; *Doughty v. Moss*, 1 Bush 161; *Perry v. Seitz*, 2 Duv. 122; *Dunn v. Salter*, 1 Duv. 242; see further, note 31.

(22) Commissioner may employ an auctioneer to cry the sale, but the sale must be made under the immediate direction of and in the presence of the commissioner. *Noland v. Noland*, 12 Bush 426.

(23) In making sales the commissioner is invested with reasonable discretion, and may exercise his best judgment touching matters that the judgment does not give specific directions about. *Head v. Clark*, 88 Ky. 362; *McLaughlin v.*

house of the county in which the property, or the greater part thereof, may be situated; and the notice of sale must state for what sum of money it is to be made. (*See as to appraisement of property before sale, Ky. Stat., sec. 2362.*)

Schneid, 11 R. 648; Hughes v. Swope, 8 R. 256.

(24) **Erroneous judgment.** The court may set aside a sale although the judgment has been followed in making it. Vanmeter v. Vanmeter, 88 Ky. 448.

(25) **Error of commissioner** in not selling land in order directed by judgment does not render sale void, although, if excepted to in proper time, sale should be set aside. Beard v. Morris, 14 R. 97.

(26) **Inadequacy of price.** An advance bid of \$1,800 upon a sale made for \$5,650 is not sufficient grounds for setting aside sale. Bean v. Johnson, 13 R. 36.

(27) A resale should not be ordered, nor should the bidding be opened, upon an increased offer of ten per cent. A sale will not be disturbed for mere inadequacy of price, unless there has been such a sacrifice of the property as to import fraud. There must be either fraud or misconduct in some one connected with the sale, some surprise or misapprehension on the part of those interested, or of the officer who conducts the sale, or some irregularity in the proceedings, or other circumstances attending it conducing to show unfairness, before the chancellor will refuse to confirm the sale. Stump v. Martin, 9 Bush 285.

(28) Mere inadequacy of price is not alone sufficient to set aside a judicial sale, but when the price bid is greatly disproportioned to the actual value of the property, only slight additional circumstances are required to justify and make it the duty of the chancellor to set it aside; and where there is any fact connected with the sale from which fraud may be presumed, or when the defendant, by casualty or misfortune, has been prevented from appearing in the action or taking steps to avoid a sacrifice of his property, it should be set aside. Bean v. Hoffendorfer, 84 Ky. 685.

(29) **Judgment—sufficiency of.** The judgment should describe the property to be sold, so that the commissioner may

know from it what property he is directed to sell. Faught v. Henry, 18 Bush 471; Posey v. Green, 78 Ky. 162; Runyon v. Darnall, 10 Bush 67; 9 Bush 665; 12 Bush 426; Johns v. Brown, 7 R. 446.

(30) An order that failed to give any direction as to the time and place of sale, except to direct the commissioner to post notices of time, terms and place of sale, as sheriffs are required to do before selling land under execution, was sufficient. Barnes v. Jackson, 85 Ky. 407.

(31) **Place of sale.** Unless judgment otherwise directs, sale of real estate should be made at court-house door. 85 Ky. 407; and see note 21.

(32) **Purchaser** is entitled to notice of motion to quash sale. Butts v. Alderson, 12 R. 443; see further, notes 19–23, sec. 697.

(33) A purchaser can not have a sale set aside because the commissioner did not advertise the property as required by law. Watson v. Violet, 2 Duv. 332; nor because the land is not sufficiently described in the judgment. Sullivan v. Berry, 83 Ky. 198.

(34) A purchaser at commissioner's sale excepted to the confirmation of the report of sale on the ground that there had been puffing and by-bidding at the sale, but was held to have waived his right to object by executing sale bonds after obtaining knowledge of all the facts connected with the sale. Robinson v. Robinson, 11 Bush 174.

(35) A bidder will be required to take the property, although the building on it has been destroyed by fire before the sale is confirmed, or he is placed in possession; and may be compelled by rule to comply with the terms of his purchase. Vance v. Foster, 9 Bush 389.

(36) When a sale is set aside at the instance of the owner, the purchaser who has been guilty of no fault, and not a party to the suit, is entitled to a judgment for his costs and reasonable attorney fees expended in resisting a motion

§ 697. Bond of purchaser and effect of—interest on. 1. The purchaser of property sold under an order of court shall give bond for the price, with good surety approved by the officer making the sale, payable to him or to the person entitled to receive the money, as the court may direct; or, if the court make no order on the subject, they shall be made payable to the officer.

2. They shall bear interest from date at the rate the judgment bears.

3. They shall have the force of judgments; and on executions issued upon them no replevy shall be allowed, and sales shall be for cash. (*Form of bond, page 626.*)

to quash the sale. *Egard v. Chearnly*, 1 Bush 12; but this case is overruled by *Vanmeter v. Vanmeter*, 88 Ky. 448.

(37) **Report of sale.** Slight variation between description of land in report and judgment is not sufficient to set sale aside. *Stephens v. Smith*, 7 R. 44.

(38) Order confirming report of sale is final and can not be set aside after the term except for some of the causes mentioned in section 518. *Kincaid v. Tutt*, 88 Ky. 392.

(39) **Sale of more land than ordered** by judgment is error and sale will be set aside. *Blakey v. Abert*, 1 Dana 185; *Gathright v. Hazard*, 17 B. M. 561; but after sale is confirmed it will not be void. *Dawson v. Litsey*, 10 Bush 408; and see as to waiver of error in selling excess. *Simrall v. Jacobs*, 14 B. M. 511.

(40) **Terms of sale.** Creditor who has procured judgment can not complain that sale was made on three months' time. *Stephens v. Smith*, 7 R. 44.

(41) **Vacation of order confirming sale.** See note 20, sec. 518.

§ 697. (1) **Collection of bonds** may be enjoined where purchaser was induced not to file exceptions to report by statements of the plaintiff. *Morrow v. Wes-sell*, 8 R. 261; and see *Wright v. Underwood*, 9 R. 712.

(2) Purchaser may be required by rule to comply with terms of sale. *Brassfield v. Burgess*, 10 R. 660; and the chancellor may order land resold as the property of the purchaser when he fails to execute bonds. *Dean v. Gritton*, 13 R. 99.

(3) **Damages may be recovered** by defend-

ant against persons who procured a sale of his property under a decree afterward reversed. *Hays v. Griffith*, 85 Ky. 375.

(4) **Defective title.** Where purchaser at judicial sale obtains the title which the court by its decree proposed to sell, he can not have an abatement of the purchase price because the court is not able to make him a clear title to part of the land. *Preston v. Breckinridge*, 86 Ky. 619.

(5) There is no warranty of title in judicial sales, and after the sale has been confirmed, and no fraud practiced on the purchaser by the creditor to induce the purchase, or warranty of title, no relief will be granted and no deduction made from the purchase price because of liens on the land which the purchaser will be compelled to pay. If, before the sale is confirmed, or during the term at which it is confirmed, the purchaser discovers a defect in the title and applies to the chancellor he will be granted relief. *Farmers' Bank v. Peters*, 13 Bush 591.

(6) Purchaser is entitled to an abatement of the purchase price to the extent of the value of land that he bought but did not get. *Akin v. Underwood*, 11 R. 757; and see notes 8, 16.

(7) The general rule does not apply to a purchaser who is induced to make purchase by the misrepresentations of the creditor or person making sale as to the condition of the title, when he could not discover condition of title until after confirmation. *Williams v. Glenn*, 87 Ky. 87; and see *Wright v. Underwood*, 9 R. 712.

§ 698. **Purchaser of personalty—when entitled to it.** The purchaser of personal property sold under an order of court shall be entitled to it, upon complying with the terms of sale.

§ 699. **Lien retained on real property sold—how released.** A lien shall exist on real property sold under an order of court, as security for the purchase money; and, upon payment thereof, the clerk shall release the lien on the margin of the record of the deed in the office of the clerk of the county court.

(8) Where the purchaser acquires no title he may recover of the debtor what he has paid for the land. *Williams v. Glenn*, 87 Ky. 87; and see notes 6, 16.

(9) Purchaser who has been evicted may recover on the warranty of title in deed to person whose land he bought at the sale. *Thomas v. Bland*, 91 Ky. 1.

(10) **Duty of court.** The court should ascertain that the right of redemption does not exist before ordering a deed or writ of possession. *Rose v. Taylor*, 8 R. 182.

(11) **Exceptions to report.** Time report shall lie over for exceptions is not prescribed; and in *Rose v. Taylor*, 8 R. 182, the court held that it was not error to confirm on February 5th "a report filed February 3d," there being no exceptions.

(12) **Exceptions to a report admit everything not excepted to.** *Taylor v. Young*, 2 Bush 428.

(13) **Appeal lies to Court of Appeals from order overruling or sustaining exceptions to report of sale.** See notes, sec. 734.

(14) **Execution for amount of two bonds,** both due and payable to commissioner, may be issued. *Poor v. Hudson*, 4 R. 349.

(15) **Improvements.** Purchaser who erected improvements even before confirmation of sale is entitled to compensation for them upon reversal of order confirming sale, but should be charged with rents. *Hayden v. Smith*, 5 R. 243.

(16) **Mistake in quantity of land sold—relief for.** Where there is a mistake as to the quantity of land sold at a judicial sale, the chancellor will, in a subsequent action, afford relief, if the mistake be such that relief would be granted if the sale had been a private one. *Miller v. Craig*, 83 Ky. 623; and see notes 4-10.

(17) **Power of commissioner after sale.**

When the commissioner has sold the property and accepted the bonds for the purchase price, his duties, so far as the sale is concerned, are at an end, and nothing remains for him to do but to report the manner in which he has discharged his duty to the court. He can not after accepting the purchaser's bonds demand additional security. If the bond is insufficient, that fact should be brought to the attention of the court, and the court may require additional security before confirming the sale. *Reamer v. Judah*, 13 Bush 206; and see notes 16-23, sec. 696; and notes 1-9, sec. 697.

(18) **Purchaser—rights and liabilities.** A purchaser at a sale made under a void judgment does not acquire any lien on the property sold for the amount of the debt paid by him when the sale is set aside. *Grigsby v. Barr*, 14 Bush 330; and see notes 4-10 and 16.

(19) **Purchaser and sureties who fail to pay bonds and surrender property for sale are liable for the difference between price at first and second sale.** *City of Lou. v. Kaye*, 10 R. 160.

(20) **Purchaser is entitled to notice of motion to quash sale bond because the sureties are insufficient.** *Butts v. Alderson*, 12 R. 443.

(21) **Rents—right of purchaser to.** A purchaser at a judicial sale is entitled to rent from the date of the confirmation of the sale. *Ball v. Bank*, 80 Ky. 501; *Taliaferro v. Gay*, 78 Ky. 496; but not to rents between date of sale and confirmation. *Brown v. Berkley*, 3 R. 469; *Elliott v. Bush*, 3 R. 466.

(22) **Reversal—effect of.** The reversal of a judgment under which a sale is made does not affect the title of the pur-

TITLE XVI.

QUARTERLY, POLICE, COUNTY AND JUSTICES' COURTS.

[JURISDICTION OF THESE COURTS, SEE PAGE 547.]

CHAPTER I. MODE OF PROCEEDING IN, 700.

II. APPEALS FROM THEIR JUDGMENTS, 724.

CHAPTER I.

MODE OF PROCEEDING IN.

- § 700. Code regulates proceedings in.
- § 701. Process—to whom directed.
- § 702. Duties and powers of judge or justice as clerk.
- § 703. Clerk of quarterly court—duty of county clerk.
- § 704. Only one docket to be kept.
- § 705. Pleadings may be oral when—statement to be filed.
- § 706. Time summons to be served to authorize trial.
- § 707. Proceedings when action called for trial.
- § 708. Evidence in equitable actions—how taken.
- § 709. Subpœna—how served.
- § 710. District in which action to be tried.
- § 711. Place of trial if more than one defendant.
- § 712. Place of trial in action against transient defendant.
- § 713. Jury trial—when may be demanded.
- § 714. Time in which new trial may be granted.
- § 715. Justice to keep indexed records.
- § 716. Interrogatories may be filed by either party.
- § 717. Judgment against party refusing to testify.
- § 718. Last two sections apply to appeals.
- § 719. Lost or destroyed judgment may be renewed.
- § 720. Set-off or counter-claim in excess of jurisdiction.
- § 721. Trial of provisional remedy.
- § 722. Land can not be levied on under execution from.
- § 723. Land—how sold when execution returned no property.

§ 700 [333] Code regulates proceedings in. The provisions of this Code shall regulate the proceedings in civil actions in quarterly courts,

chaser at the sale, although he may be the plaintiff. The sale can not be quashed. When the sale is confirmed the chancellor loses all control over it, except during the term at which the order is made, and the only remedy of the party complaining is to except to the confirmation, if there is sufficient cause,

and if the exceptions are overruled to appeal. *Yocum v. Foreman*, 14 Bush 494; *Earl v. Porter*, 2 R. 316; and see *Vanbussum v. Maloney*, 2 Met. 550; and see as to right of debtor to damages for wrongful sale, note 3.

(23) Rule that purchaser of land is not affected by reversal of judgment does not

county courts, police courts, city courts, mayors' courts, and courts of justices of the peace, except as is provided in this chapter. (*As to jurisdiction of quarterly and justices' courts, see page 547; transfer to circuit court of actions involving title to real estate, Ky. Stat., sec. 1052.*)

§ 701 [222] **Process—to whom directed.** A summons, order for a provisional remedy and other process, from quarterly courts or county courts, shall be directed to the sheriff, coroner or a constable, at the option of the plaintiff; those from police, city and mayors' courts shall be directed to the marshal or a constable; and those from courts of justices of the peace shall be directed to a constable; or to a special agent appointed by the justice, by an indorsement on the process, upon an affidavit of the plaintiff or his agent being filed before the justice, to the effect that the process can not be executed, according to the belief of the affiant, unless such special agent be appointed; but such process may be served by any officer or person who is authorized by this Code to serve a summons. (*Officers who can serve summons, sec. 667; form of summons, page 624; of subpoena, page 643; of execution, page 638; of distress warrant, page 642; of attachment, page 634.*)

§ 702 [224] **Duties and powers of judge or justice as clerk.** The duties and powers enjoined and conferred by this Code upon clerks shall devolve on the judges or justices who are by law required to act as clerks of their courts.

§ 703 [225] **Clerk of quarterly court—duties of county clerk.** 1. The presiding judge of the quarterly court shall be the clerk of such court.

2. The county judge may, by an order entered of record in the quarterly court, empower the county clerk to act as clerk of the quarterly court; and, upon such order being entered, the clerk shall be authorized to issue any process of the quarterly court, as fully as the judge might do, acting as clerk of such court. And

apply when the land ordered to be sold is purchased by the plaintiff, and it appears that defendant does not owe debt to satisfy which land was sold, and that the land, in fact, was not owned by defendant. *Baker v. Baker*, 87 Ky. 461; and see *Payne v. Johnson*, 95 Ky. 175, for other exception to rule.

(24) The fact that judgment is reversed before sale is confirmed is not of itself sufficient grounds to set aside sale. *Musgrave v. Parrish*, 11 R. 573.

(25) **Time to execute bonds** is a matter largely in the discretion of the commissioner. *Hughes v. Swope*, 8 R. 256; and see further, as to duty and discretion of commissioner, notes 15-23, sec. 696.

§ 701. **Sheriff may execute process.** A sheriff can execute an attachment or other provisional remedy from a justice's court. *Turner v. Howard*, 2 Duv. 112; and may execute an execution as word "process" includes execution. *Gowdy v. Sanders*, 88 Ky. 346.

the county clerk issuing such process shall be entitled to the same fees, and subject to the same responsibilities, as the judge would have been.

3. Such order shall not prevent the judge from acting as clerk of the quarterly court in any case in which he may choose so to act.

4. If no such order be made, the county clerk shall, in the absence of the county judge from his office, act as clerk of the quarterly court, in the same manner as if such order had been made.

5. The county clerk shall, at the commencement of each term of the quarterly court, deliver to the presiding judge all process of such court returned to him, and all papers filed with him relating to actions pending in such court.

§ 704 [***] **Only one docket to be kept.** Only one docket is required to be kept, on which shall be entered all the actions and motions as they shall be returned.

§ 705 [***] **Pleadings may be oral when—statement to be filed.** If the matter in controversy do not exceed fifty dollars, the pleadings in the action may be oral and without verification. But before the summons is issued the plaintiff shall file in the court the account, or the written contract, or a short written statement of the facts, on which the action is founded. (*The forms of pleadings commencing on page 596 will answer in cases in quarterly and justices' courts when written pleadings are required.*)

§ 706 [***] **Time summons to be served to authorize trial.** In the actions named in the last section, the service of the summons five days before

§ 705. (1) **Pleadings — when to be in writing.** If the matter in controversy exceeds fifty dollars the pleadings must be in writing, and where the plaintiff sues for an aggregate amount, made up of interest and principal together, exceeding fifty dollars, as where he asks judgment for forty-five dollars and eight dollars interest thereon, the pleadings must be in writing. *Bracy v. Bracy*, 12 Bush 153; but see *Puff v. Hutcher*, 78 Ky. 146; note 1 to sec. 726.

(2) The written statement of facts on which the action is founded need not contain a demand for the relief to which the plaintiff considers himself entitled, nor the amount demanded by him, and if it does state the amount it is mere surplusage. The warrant should state

the amount demanded, and the amount stated in the warrant is the amount in controversy. *Burbage v. Squires*, 3 Met. 78.

(3) In a suit in a justice's court the plaintiff filed a statement claiming fifty-five dollars, but the amount claimed in the warrant was only twenty-five dollars, and the court held that the amount claimed in the warrant and not in the statement determined the amount in controversy and the question of jurisdiction. . 3 Met. 78.

(4) Interest due upon a debt at the time the action is commenced constitutes a part of the amount in controversy. *Orth v. Clutz*, 18 B. M. 223; *Wigginton v. Moss*, 2 Met. 38; *Fidler v. Hall*, 2 Met. 461.

the time of trial shall authorize a trial and judgment. If the matter in controversy exceed fifty dollars, the service of the summons ten days before its return day shall authorize a trial and judgment, whether the proceedings are ordinary or equitable. (*Forms of judgments, page 647.*)

§ 707 (1899) **Proceedings when action called for trial.** Upon the calling of an action for trial, if the summons have been served in due time, the parties must proceed forthwith to form an issue and try the case, unless the court give further time, or grant a continuance.

§ 708 (1899) **Evidence in equitable actions—how taken.** In equitable actions, the parties may either take the depositions of witnesses or examine them orally in court.

§ 709 (1899) **Subpœna—how served.** A subpœna may be served by showing it to the witness and informing him of the substance of it, without delivering to him a copy or ticket.

§ 710 (1899) **District in which action to be tried.** If the defendant reside in the county in which the summons is issued, it shall be returned for trial in the district of his residence, unless he otherwise consent in writing, signed by him and indorsed on the summons; or, unless the justices in such district be interested or refuse to act, in which case it shall be returned in an adjoining district. If it be issued by the judge of the quarterly court, it shall be returned before him [unless the defendant, or defendants, all reside in one district and there be an acting justice of the peace and an acting constable in such district]. (*Words in brackets stricken out by act 1890.*) [So much of this section as requires summons to be returned for trial in district of defendant's residence seems to be repealed by sec. 1086, Ky. Stat. Can not summons be returned to justice issuing it and trial had in his court without reference to district of defendant's residence? ED.]

§ 711 (1899) **Place of trial if more than one defendant.** If there be two or more defendants residing in the county, but in different districts, the summons shall be returnable in either district.

§ 712 (1899) **Place of trial in action against transient defendant.** If a defendant transiently in a county be served with a summons issuing in said county, it shall be returned in the district in which he is served, unless he otherwise consent in writing signed by him.

§ 713 (1899) **Jury trial—when may be demanded.** The parties shall not be entitled to a trial by jury, unless the matter in controversy exceed in value twenty dollars. Upon a jury trial being claimed, if it be allowable, the presiding judge or justice shall order a jury to be

forthwith impaneled to try the action. The jurors shall be qualified as is required in the circuit courts. (*Six jurors sufficient, Ky. Stat., sec. 2252.*)

§ 714 (836) **New trial—time in which may be granted.** A new trial may be granted in the quarterly courts or courts of justices of the peace, upon motion made within ten days after a judgment has been rendered, of which motion reasonable notice shall be given to the adverse party.

§ 715 (837) **Justice to keep indexed record of proceedings.** Each presiding judge and justice of the peace shall, in a book provided for that purpose, keep a full and fair record of judicial proceedings in his court; and keep a good cross-index of the names of the litigants, referring to the pages of the book of every entry in each case.

§ 716 (838) **Interrogatories may be filed by either party.** Either party may file with the judge, justice or clerk of the court, in which the case is to be tried, written interrogatories, to be answered by an adverse party who resides out of the county where the court sits, or who is unable to attend court on account of infirmity or imprisonment, or who is a female; and may cause a certified copy of such interrogatories to be delivered to the party who is required to answer them; and such party shall file with the clerk, on or before the day of trial, a plain and direct response to the interrogatories, sworn to by him. Such response may be read as a deposition by either party.

§ 717 (840) **Judgment against party refusing to testify.** The court shall render judgment against the party who refuses to attend and be examined when summoned, as is authorized by this Code, two days before the trial; or to make proper responses to interrogatories, a copy of which shall have been delivered to him three days before the trial, if he reside within fifty miles of the place of trial, and one additional day for every additional thirty miles he may reside therefrom; but the court may grant further time for attending or answering.

§ 718 (841) **Last two sections apply to appeals.** The last two sections shall apply to appeals from judgments of quarterly, justice's, city, police and mayor's courts.

§ 719 (842) **Lost or destroyed judgment may be renewed.** If the record of a judgment of a quarterly, city, police, mayor's or justice's court be lost or destroyed, such court may, on motion of the plaintiff, made within five years after the rendition of the judgment, and after five days' notice, render a new judgment for what may remain due thereon.

§ 720 (843) **Set-off or counter-claim in excess of jurisdiction.** A set-off or counter-claim, though exceeding, in amount, the jurisdiction of the

court, may be used to bar and extinguish the demand of the plaintiff; but no judgment shall be rendered in favor of the defendant for the excess, unless such excess be within the limits of the court's jurisdiction as to amount. The judgment shall ascertain the amount due to the plaintiff and give him a credit therefor on the claim used as a set-off or counter-claim: [*Provided, That when the amount of the counter-claim or set-off exceeds the jurisdiction of the court trying the cause, the court shall, on motion of either party to the action, or by their attorneys, transfer the cause to the court having jurisdiction.*] (*Words in brackets added by act 1893; set-off and counter-claim defined, sec. 96.*)

§ 721 [844] **Trial of provisional remedy.** If an order for a provisional remedy, made by a judge or justice, in an action within the jurisdiction of his court, be served or levied, the trial of the action and disposition of the order may take place at any time after five days' notice given to the defendant by the officer who serves or levies such order; or after five days' notice given by the defendant to the plaintiff, upon a counter-affidavit filed by the defendant; and if the judge or justice, before whom the trial should regularly be had, be absent or unable to act, the officer may return the case for trial before the most convenient justice.

§ 722 [845] **Land can not be levied on under execution from.** Land shall not be sold nor levied on under execution from a quarterly or justice's court, or any court of similar jurisdiction.

§ 723 [846] **Land how sold when execution returned "no property."** When an execution upon a judgment of a court mentioned in section seven hundred and twenty-two is returned by a proper officer, in whole or in part, in substance, no property found to satisfy it, the judge or justice of the court shall, upon application of the plaintiff or his attorney, furnish a certified copy of the judgment, execution and return; which, on being filed in the office of the clerk of the circuit court of the county in which the judgment was rendered, shall be recorded by him in a book kept for that purpose; and, thereupon, the plaintiff shall be entitled to the same remedies for the amount of his judgment and costs, including the costs of said copy and of recording it, as if the judgment had been rendered in the circuit court.

§ 723. Proceedings upon return of no property. See notes to sec. 439.

CHAPTER II.

APPEALS FROM THEIR JUDGMENTS.

- § 724. Appeal—how taken—transcript.
- § 725. Original papers transmitted to Appellate Court.
- § 726. Appeals—when stand for trial and how tried.
- § 727. Costs upon appeal.
- § 728. Costs in inferior court.
- § 729. Time in which appeal to be taken.
- § 730. Rights of appellee if appellant fails to prosecute.
- § 731. Transcript to be furnished party appealing.

§ 724 [347] **Appeal—how taken—transcript.** Appeals may be taken in the manner following:

1. The party appealing shall produce to the clerk of the court to which the appeal is taken a certified copy of the judgment and amount of costs, and cause to be executed before him, by one or more sufficient sureties to be approved by him, a bond to the effect that the appellant will satisfy and perform the judgment that shall be rendered upon the appeal; whereupon, the clerk shall issue an order to the judge, mayor or justice, rendering the judgment, to

§ 724. (1) **Amount in controversy.** In determining the amount in controversy the interest is always computed up to the time when the amount in controversy is necessary to confer jurisdiction. *Orth v. Clutz*, 18 B. M. 223; *Fidler v. Hall*, 2 Met. 461; *Bracy v. Bracy*, 12 Bush 153; *Wigginton v. Moss*, 2 Met. 38.

(2) In all appeals from the judgments of justices when amount gives jurisdiction, it is the amount in controversy, or, more specifically, the amount claimed and litigated before the justice. *Donahue v. Murray*, 2 Bush 194; and see note 3, sec. 705.

(3) Where the amount claimed is sufficient to authorize an appeal, either party may appeal from the judgment, no matter how small it is, and although the judgment against the defendant be less than would authorize an appeal, he can appeal if the amount he was sued for is large enough to authorize an appeal. 2 Bush 194.

(4) **Appeal bond.** A plaintiff appealed from the justice's court to the quarterly court, where judgment was rendered

against him for costs. The surety on the appeal bond attempted to escape liability because the quarterly court did not have jurisdiction. He was held liable on the ground that the execution of the bond delayed and obstructed the collection of the judgment in the justice's court, and subjected the defendant to the costs of an additional trial, which was sufficient consideration to uphold the bond. *Stephens v. Miller*, 80 Ky. 47.

(5) Duty of clerk to prepare, sec. 672; defective bond may be corrected, sec. 682; 2 Duv. 77; 3 Bush 94.

(6) **Attachment—order sustaining may be appealed from.** Order of justices' or quarterly court sustaining an attachment may be appealed from to the circuit court without appealing from the personal judgment for the debt. The bond should be to pay the costs, and any judgment that may be rendered on the appeal from the order sustaining the attachment. When such appeal is taken the creditor can collect his judgment by execution, but can not sell the attached property. If the circuit court sustains

stay proceedings thereon; and to transmit to the office of said clerk all the original papers in the case; and the appellee shall be summoned, actually or constructively, as is provided in chapter two of title four, to appear and defend the appeal. The provisions of this section, in regard to clerks, apply to a judge who acts as clerk of his own court.

2. [If the amount in controversy be of the value of twenty dollars or more, exclusive of interest and costs, either party may direct the appeal to be taken to the circuit court, and the judge or justice shall make a minute thereof as part of the record.] (*Words in brackets repealed by Ky. Stat., secs. 978, 1054. As to jurisdiction of appeals, see page 547; form of summons on appeal, page 651; appeal bond and supersedeas, page 651; if appeal bond defective, new one may be executed, sec. 682.*)

the attachment an order will be made directing a sale of the attached property. *Hawkins v. Baldauf*, 10 Bush 624.

(7) **Dismissal of appeal** without prejudice is not a bar to a subsequent appeal taken within sixty days from date of judgment appealed from. *Brooks v. Brooks*, 3 R. 253.

(8) The dismissal of an appeal by the circuit court deprives that court of jurisdiction over the case, and remits it to the magistrate whose judgment has been appealed from. *Olmstead v. Mason*, 3 Bush 603; and where the motion is made by appellee and sustained, he must look to his judgment in lower court; the circuit court can not render judgment in his favor for amount of judgment appealed from. *Manier v. Lindsey*, 3 Bush 94.

(9) Appeal should be dismissed if court to which it is taken has no jurisdiction of the appeal. *Jones v. Thompson*, 12 Bush 394; and where court in which action is instituted has no jurisdiction if an appeal be taken from its judgment the appeal should be dismissed. *Fidler v. Hall*, 2 Met. 461.

(10) **Jurisdiction—waiver.** Where the circuit court has jurisdiction of the subject matter, if an appeal is taken to it, when it should have been taken to the quarterly court, the objection to the jurisdiction will be waived by failure to move to dismiss the appeal and consent-

ing to the trial. *Hughes v. Hardesty*, 13 Bush 364; see *Fidler v. Hall*, 2 Met. 461.

(11) **Jurisdiction—consent can not give.** A case appealed from the justice's court to the quarterly court can not, without any trial there, be transferred by agreement to the circuit court. The latter court should dismiss the appeal. *Davis v. Davis*, 10 Bush 274. And where the justice dismissed a warrant because the amount in controversy exceeded his jurisdiction, and the quarterly dismissed the case on appeal to that court, the plaintiff having appealed to the circuit court, that court should have dismissed the appeal for want of jurisdiction. *Fidler v. Hall*, 2 Met. 461.

(12) **Practice on appeal.** Transcript of judgment may be attested as a true copy by justice with the permission of circuit court, even after expiration of sixty days from date of judgment. *Com. v. Knoerr*, 3 R. 624.

(13) On appeal, the circuit court has power only to render judgment for the plaintiff for whatever may be due him, or if nothing be due, to dismiss the action, or if it is proper to do so the appeal may be dismissed, and until one of these things be done the case remains in circuit court. The circuit court has no power to "reverse" the justice's judgment. *Bennett v. Thompson*, 10 Bush 365.

(14) When a case is transferred by appeal to the circuit court the justice

§ 725 (1848) **Original papers transmitted to Appellate Court.** The judge, mayor or justice, on being served with said order, shall, in ten days thereafter, transmit all the original papers in the action to the clerk's office of the court to which the appeal is taken.

§ 726 (1848) **Appeals—when stand for trial and how tried.** Appeals shall be docketed and stand for trial as ordinary actions, and shall be tried anew, as if no judgment had been rendered.

has no further power over it, *Palmer v. Kennedy*, 7 J. J. M. 497, unless appeal is dismissed. *Manier v. Lindsay*, 3 Bush 94.

(15) The burden of proof is the same in the circuit court as if action had been instituted in that court by the plaintiff, and he must make out his case. *McKittrick v. Peter*, 5 Dana 587.

(16) The Code does not authorize the filing of pleadings upon an appeal where the amount sued for did not require a petition, but if pleadings are filed they can not increase the demand beyond the jurisdiction of the court in which action was commenced. *Burbage v. Squires*, 3 Met. 78. See notes to sec. 726.

(17) After jury is sworn it is too late to object that the papers have not been returned by the justice. *Grimes v. Dearborn*, 3 J. J. M. 60.

(18) From a joint judgment against several defendants either can appeal, and thereby all the defendants are necessarily brought into the court appealed to as parties. *Palmer v. Kennedy*, 7 J. J. M. 498; *Clagget v. Blanchard*, 8 Dana 41.

§ 726. (1) **Amendment on appeal—garnishee.** A filed an affidavit against B in a justice's court, and garnisheed fifty-nine dollars in the hands of C. No petition was filed. The attachment was discharged, and C directed by the justice to pay the money attached to B, which he did. A prayed an appeal at the time the attachment was discharged, and the same day filed his appeal in the circuit court. On the trial in the circuit court A was permitted to file an amended petition, setting up properly his claim. The attachment was sustained, and the garnishee required to pay the money attached to A. This judgment was affirmed. Whether, when money is at-

tached, the garnishee must hold it until the time to appeal expires, not decided. *Puff v. Hatcher*, 78 Ky. 146.

(2) **Power of circuit court on appeal.** The only power the circuit court has on appeal is to render judgment for whatever may be found due on the trial; or, if nothing is found due, to dismiss the action; or, if the appeal is not regularly prosecuted, or the court has no jurisdiction, to dismiss the appeal, and until some of these things are done the case remains in court. The court has no power to reverse the judgment of the justice. *Bennett v. Thompson*, 10 Bush 365; and see notes 5-18, sec. 724.

(3) When an appeal is taken to the circuit court from the judgment of a justice's court that had no jurisdiction of the subject matter, no recovery can be had in the circuit court against the defendant, and in such case the circuit court should make such orders as will render the proceedings in the justice's court inoperative. *Wigginton v. Moss*, 2 Met. 38.

(4) If, on an appeal from the judgment of a justice, it appears that the justice had no jurisdiction of the cause, the court should dismiss the action. *Fleming v. Limebaugh*, 2 Met. 265.

(5) **Same case to be tried on appeal—amendment.** Upon the trial of an appeal the cause of action must be the same as that expressed in the warrant, and it must be a cause of action over which the justice had jurisdiction. It must be the same identical case which was tried by the justice, and not a new case. Upon the trial of the appeal no new cause of action can be relied upon. The same action may be tried *anew*, but no new action is to be tried. *Burbage v. Squires*, 3 Met. 78.

§ 727 ⁽⁸⁸⁸⁾ **Costs upon appeal.** Unless the judgment on the appeal be more favorable to the appellant than the original judgment, he shall pay the costs of the appeal. If he merely succeed in reducing the amount of a judgment rendered against him, it shall be at the discretion of the court to allow him costs or not.

§ 728 ⁽⁸⁸¹⁾ **Costs in inferior court.** The costs in the inferior court shall be adjudged in favor of the plaintiff, if he succeed in obtaining, on the appeal, a judgment for any amount; otherwise, in favor of the defendant.

§ 729 ⁽⁸⁸²⁾ **Time in which appeal must be taken.** No appeal shall be taken pursuant to this article, except within sixty days from the rendering of the judgment. (*How days between acts counted, sec. 681.*)

§ 730 ⁽⁸⁸³⁾ **Rights of appellee if appellant fail to prosecute.** If the appellant move to dismiss or fail to prosecute his appeal, it shall be at the option of the appellee either to proceed to trial on the appeal, or to have judgment rendered for the amount of the original judgment and costs, if it was in his favor, or in bar of the original judgment, if it was against him.

§ 731 ⁽⁸⁸⁴⁾ **Transcript to be furnished party appealing.** If a party wish to take an appeal, the mayor, judge or justice before whom the case was tried shall deliver to him, upon application, a copy of the judgment and amount of costs certified by him.

(6) "A plaintiff can not, upon an appeal, amend his pleadings so as to set up a new and independent cause of action. The case, *i. e.*, the cause of action, to be tried on the appeal must be the same that was tried in the lower court; but to that case the defendant has the right to make all the defenses he has. If he fails to set up any defense, and allows judgment to go by default, it is within the discretion of the court in which the appeal is pending for a trial *de novo* to allow an answer to be filed. So, too, that court may in the same way allow the defense to be changed, or new defenses to be made, as if the case had been originally brought in that court." *Willis v. McNeal*, 8 R. 411.

(7) **Tender of amount before appeal taken—effect.** *Ky. Stat.*, sec. 890.

§ 727. (1) **Costs—how adjudged on appeal.** When the appellant succeeds in reducing the amount of the judgment against him, the court may adjudge to or withhold from him his own costs, but can not give judgment against him for the costs of the appellee. *Gentry v. Doolin*, 1 Bush 1; and see *L. & T. R. R. v. Barrett*, 91 Ky. 487.

(2) Judgment against appellant for costs on dismissal of his appeal for want of jurisdiction is erroneous. *Williams v. Wilson*, 5 Dana 596.

(3) On appeal to the circuit court the plaintiff had no cause of action and was properly adjudged to pay the costs in both courts. *Willis v. McNeal*, L. R. 411.

§ 729. **Time—how computed.** See notes to sec. 681.

TITLE XVII.

RULES OF CONSTRUCTION OF THIS CODE.

§ 732. Rules that prevail.

§ 733. Code not to be strictly construed.

§ 732 (333 to 373) **Rules that prevail in construing Code.** In construing the provisions of this Code, these rules shall prevail, unless a different intention be expressed, or be shown by the context:

1. **Title—chapter—article—section.** The words “title,” “chapter,” “article,” “section,” and the figure §, refer to provisions of this Code.

2. **Tense.** Each tense includes every tense.

3. **Gender.** Each gender includes every gender.

4. **Plural—singular.** The singular includes the plural, and the plural the singular, number.

5. **Person.** The word “person” includes a corporation.

6. **Writing.** The word “writing” includes printing and printed paper.

7. **Signature—subscription.** The words “signature,” “subscription” and words of like import, include a mark by, or for, a person who can not write, if his name be subscribed to an instrument and witnessed by a person who, near thereto, writes his own name as a witness.

8. **Action for money, includes what.** An action for money includes an action for the recovery of damages as well as of money due by contract.

9. **Real property.** The words “real property” mean lands, tenements and hereditaments.

10. **Personal property.** The words “personal property” mean money, goods, chattels, things in action and evidences of debt.

11. **Property.** The word “property” includes any vested interest, legal or equitable, in real or personal property.

§ 732. (1) “**Chief officer**” of railroad corporation is, first, its president; second, its vice-president. *Harper v. N. N. & M. V. R. R.*, 90 Ky. 359.

(2) **Construction of statutes.** See Ky Stat., sec. 446.

(3) “**Process**” includes execution.

Gowdy v. Sanders, 88 Ky. 346; *Johnson v. Elkins*, 90 Ky. 103.

(4) “**Signature.**” Subsection seven only applies to writings that may be, or are, required under the Code. *Meazels v. Martin*, 93 Ky. 50; *Maupin v. Berkley*, 3 R. 617; and see *Vanover v. Murphy*, 12 R. 733.

12. **Court—judge—justice—clerk.** The word “court” refers to the court in which an action or proceeding is pending, or may be brought; and the words “judge,” “justice,” “clerk,” refer to officers of such court.

13. **Justices’ courts—quarterly courts.** The words “justices’ courts” or “quarterly courts” embrace courts having similar jurisdiction, in whole or in part, to that of justices’ courts or quarterly courts; and the words “justice” or “presiding judge,” and words of like import, embrace judges of either of said courts.

14. **Circuit court—circuit judge.** Excepting criminal courts and judges thereof, the words “circuit court” embrace courts having similar jurisdiction, in whole or in part, to that of circuit courts; and the words “circuit judge” embrace judges of either of said courts.

15. **Sheriff.** The word “sheriff” means the sheriff of the county in which the action or proceeding referred to is pending, or the sheriff of another county to which process is directed; and it means, also, any officer or person who is or may be authorized by law to act as, or in place of, a sheriff.

16. **Coroner — justice — jailer — constable.** The words “coroner,” “justice,” “jailer,” “constable,” mean officers of the county in which the action or proceeding referred to is pending, or may be brought, or to which the process referred to is directed.

17. **Personal representative.** The words “personal representative” mean the executor or administrator or other person appointed to take charge of the estate of a deceased person.

18. **Real representative.** The words “real representative” mean the heir or devisee of real property of a deceased person.

19. **Representative.** The word “representative” includes personal and real representatives.

20. **Successor.** The word “successor” means a person who takes the place of another as personal representative, curator, guardian, receiver, trustee or committee.

21. **Other country—foreign corporation.** The words “other country,” “foreign corporation,” and words of like import, refer to any part of the world out of this State.

22. **United States.** The words “United States” embrace the States and Territories thereof and the District of Columbia.

23. **Oath.** The word “oath” includes affirmation, in any case in which it may be substituted for an oath, and in like cases the word “sworn” includes affirmed.

24. **Verification—verified.** The word “verification” includes oath and affirmation, and the word “verified” includes sworn and affirmed.

25. **Month—year.** The word “month” means calendar month, and the word “year” means calendar year.

26. **Process.** The word “process” means a writ or summons issued in the course of judicial proceedings. (*See note, page 358.*)

27. **Writ.** The word “writ” means an order or precept in writing, issued by a court, clerk or judicial officer.

28. **Joint tenants.** The words “joint tenants,” and words of like import, embrace tenants in common and in coparcenary.

29. **Joint property.** The words “joint property,” and words of like import, embrace property held jointly or in partnership or in coparcenary or in common.

30. **Joint debtors.** The words “joint debtors,” and words of like import, embrace all persons who may be sued in one action upon the plaintiff’s demand.

31. **Disability.** The word “disability” means coverture, infancy, unsoundness of mind or imprisonment in a penitentiary of this State or of any other country.

32. **Residence—reside.** The words “residence,” “reside,” mean, with reference to a corporation, its chief office or place of business.

33. **Chief officer or agent of corporation.** The chief officer or agent of a corporation which has any of the officers or agents herein mentioned is: First, its president; second, its vice-president; third, its secretary or librarian; fourth, its cashier or treasurer; fifth, its clerk; sixth, its managing agent.

34. **Action.** The word “action” embraces a demand for a set-off or counter-claim; and also embraces special proceedings, so far as the provisions of this Code concerning actions are properly applicable to such proceedings.

35. **Party.** The word “party” means a plaintiff or defendant in an action, and embraces any person who has a right and seeks to become a party to an action.

36. **Plaintiff—defendant—petition.** The word “plaintiff” embraces a defendant who demands a set-off or counter-claim; the word “defendant” embraces a plaintiff against whom such demand is made; and the word “petition” embraces an answer or reply in which such demand is made, and also embraces cross-petitions.

37. **Sue.** The word “sue” refers to an action or special proceeding.

38. **Examiner.** The word “examiner” embraces any person authorized to take a deposition.

39. **Clerk.** The word “clerk” embraces justices and judges of courts which have no clerk.

40. **Person of unsound mind.** The words “person of unsound mind” include persons who are destitute of mind.

§ 733 [874] **Code not to be strictly construed.** The rule of the common law, that statutes in derogation thereof are to be strictly construed, shall not be applied to this Code. (*See note, page 358.*)

TITLE XVIII.

APPEALS TO THE COURT OF APPEALS.

[SEE JURISDICTION OF COURT, PAGE 547, RULES OF COURT, PAGE 593.]

- CHAPTER I. HOW GRANTED, 734.
 II. SUPERSEDEAS ON APPEALS, 747.
 III. TRIAL AND DECISION, 753.

CHAPTER I.

HOW GRANTED.

- § 734. Appeal matter of right—how granted.
- § 735. Designation of parties to appeal.
- § 736. Summons when necessary—warning order.
- § 737. Transcripts how prepared—schedule.
- § 738. Time in which transcript to be filed.
- § 739. Statement to be filed with transcript by appellant.
- § 740. Statement must be filed before appeal docketed.
- § 741. Appellee may file copy of record.
- § 742. Writ of certiorari—when to be issued.
- § 743. Court may issue writ, or order original papers filed.
- § 744. Costs—appellant may be required to secure.
- § 745. Limitation of right to appeal.
- § 746. Tax on appeals.

§ 734 [876] **Appeal matter of right—how granted.** The mode of bringing the judgment of an inferior court to the Court of Appeals, for reversal

§ 734. (1) **Accepting satisfaction of judgment—collection of uncontested part.** Where a party recovers judgment upon an indivisible claim and collects it by execution, he can not afterward maintain an

appeal on the ground that his judgment did not amount to as much as he sued for; and if, pending the appeal, the appellant accepts satisfaction of the judgment in his favor, his appeal will, on

or modification, shall be by an appeal, which shall be granted, as matter of right, to a party or privy against a party or privy, by the court rendering the judgment, on motion made during the term at which it is rendered, or thereafter by the clerk of the Court of Appeals, on application of either party or his privy, upon filing in

proper application, be dismissed. *Paine v. Woolley*, 80 Ky. 568; *Com. v. South*, 80 Ky. 582. But see amendment to sec. 757.

(2) The collection of a judgment for the part of plaintiff's claim that is not contested does not bar him from prosecuting an appeal from a judgment dismissing his action as to that part of it controverted. *Campbell v. C. S. R. W.*, 80 Ky. 585.

(3) Accepting satisfaction of judgment by withdrawing the money deposited in court in satisfaction thereof bars right of appeal. *Brown v. Vancleave*, 86 Ky. 381.

(4) **Books**—appeal may be taken from absolute rule requiring production of. *Marion Nat. Bank v. Abell*, 88 Ky. 428.

(5) **Clerical misprision**. See secs. 517, 763 and notes thereto.

(6) **Confirmation of commissioner's report** auditing claims in settlement of an estate is not final, as the court may disregard it when final judgment is rendered. *Adkisson v. Dent*, 88 Ky. 628.

(7) **Consent judgment**. A consent judgment will not be reversed on the appeal of a party consenting thereto. *Duncan v. Louisville*, 13 Bush 378; *Stone v. Werts*, 3 Bush 486.

(8) "It has been held by this court that parties may, by consent, make final, for purposes of appeal, a decree or order of the circuit court that otherwise would be deemed interlocutory, and such consent has been deemed sufficient to confer jurisdiction here. But those cases were exceptions to the general rule." *Overby v. Gay*, 17 B. M. 144.

(9) **Contempt**. Distinction between criminal and civil contempt, and holding that an appeal lies in cases of civil contempt. *City of Newport v. Newport Light Co.*, 92 Ky. 445.

(10) The Court of Appeals has no jurisdiction to retry a question of con-

tempt or no contempt, but it has jurisdiction to revise and correct erroneous and illegal sentences or judgments imposed in such cases. *Turner v. Com.*, 2 Met. 619. See as to power of court to punish for contempt, *In re Woolley*, 11 Bush 95.

(11) **Death of party pending appeal—practice, effect**. *Spalding v. Wathen*, 7 Bush 659; *Hopkins v. Hopkins*, 91 Ky. 310; and see as to right of surviving partner to prosecute an appeal where other partner dies after appeal is granted. *Clay v. Gibson*, 13 R. 414.

(12) **Demurrer**. Order overruling demurrer to answer and reciting that plaintiff declined to plead further, excepted to the judgment and prayed an appeal, is final, although it does not expressly order dismissal of petition. *Zable v. Lou. Baptist Home*, 92 Ky. 89; the general rule is that a judgment must follow the demurrer. 81 Ky. 345.

(13) **Divided court**. "When the case presents two or more questions and the members of this court are equally divided in opinion upon one or more of such questions and the judgment is reversed upon other points upon which all agree, the opinion of the judges who agree with the court below upon the questions about which there is an equal division here becomes the law of the case as to those questions and binding upon this court on a future appeal." *Smith v. Brannin*, 79 Ky. 114. If the court is equally divided the judgment of the lower court stands affirmed. Ky. Stat., sec. 955.

(14) **Divorce**. Judgment granting can not be appealed from. Ky. Stat., sec. 950; although it may be only from bed and board. See note 3, sec. 420.

(15) **Fiduciary—when right of to appeal ceases**. The right of an unsuccessful party, who occupies a fiducial relation, to prosecute an appeal ceases when he

the office of said clerk a copy of the judgment from which he appeals. (*What judgments will not be reversed, sec. 763; final order may be appealed from, secs. 266, 298; appeal from county court, sec. 499; form of orders granting appeal, page 650; jurisdiction of Court of Appeals, page 547.*)

resigns or is removed, and so with a bankrupt when his right passes to the assignee. *Parks v. Doty*, 13 Bush 727.

(16) **Final order or judgment defined.** The rule is "that a judgment to be final must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief of its own force or be enforceable for that purpose without further action by the court or by process of contempt." *Bondurant v. Apperson*, 4 Met. 30; *Hanson v. Bowger*, 4 Met. 108; judgment that determines the right but does not give the relief is not final. *Bank v. Allen*, 8 R. 36.

(17) **Final order or judgment from which an appeal lies** either terminates the action itself or operates to divest some right in such manner as to put it out of the power of the court making the order after the expiration of the term to place the parties in their original condition. *Harrison v. Lebanon Water Works*, 91 Ky. 255; and see further, notes to sec. 368.

(18) **Granting in Court of Appeals.** Where the appeal granted by the lower court is not taken, or where the record under the appeal in lower court is not filed in time, and the appeal is dismissed, an appeal may be granted by the clerk of the Court of Appeals within the time allowed. *City v. Elrod*, 14 Bush 216; *Wearen v. Smith*, 80 Ky. 216.

(19) **Suing out a summons** against the appellee is not made a requisite to the granting of the appeal, and is not necessary to secure an appeal. The appeal is taken by, and dates from, the filing of the record (now copy of the judgment) with the clerk of the Court of Appeals. *Jones v. Finnell*, 8 Bush 25.

(20) **Granting by Clerk of Court of Appeals** before expiration of term of circuit court at which judgment was rendered is a nullity and may be disregarded. *Schmidt v. Mitchell*, 95 Ky. 342.

(21) **Granting by lower court.** The lower court has no power to grant an appeal after the expiration of the term at which the judgment was rendered, or the motion for a new trial overruled. *Wright v. Woolfolk*, 14 Bush 308; *City v. Elrod*, 14 Bush 216; *American Accident Co. v. Reigart*, 92 Ky. 142; and see note 42.

(22) **Habeas corpus.** No appeal lies from decision of an inferior court upon a writ of habeas corpus. *Gill on Petition*, 92 Ky. 118; *Weddington v. Sloan*, 15 B. M. 147.

(23) **Judicial sales.** Appeal may be taken by purchaser at decretal sale from order setting aside sale, although property is worth less than one hundred dollars. *Hughes v. Swope*, 88 Ky. 254; and from an order confirming a report of sale, *Kincaid v. Tutt*, 88 Ky. 392.

(24) **Jurisdiction.** Amount in controversy where the defendant appeals is amount of judgment against him, and not the amount sued for. *L. & N. R. R. v. Wade*, 89 Ky. 255; a different rule obtains when defendant prosecutes an appeal to the circuit court from the judgment of an inferior court; in such cases the amount sued for, and not the amount of the judgment, determines the question. *Donahue v. Murray*, 2 Bush 194.

(25) The interest due upon a debt is a part of the amount in controversy. *Orth v. Clutz*, 18 B. M. 223; *Bracy v. Bracy*, 12 Bush 153; *Bakewell v. Howell*, 2 Met. 268; *Fidler v. Hall*, 2 Met. 461.

(26) Where the matter in controversy exceeded fifty dollars (now one hundred dollars) the Court of Appeals had jurisdiction on an appeal by the plaintiffs from a judgment in their favor for three dollars, but the defendant could not appeal as the judgment against him was for less than fifty dollars (now one hundred dollars). *Brandies v. Stewart*, 1 Met. 395; *Revill v. Pettit*, 3 Met. 315; *Tipton v. Chambers*, 1 Met. 563.

§ 735 [877] **Designation of parties to appeal.** The party taking the appeal shall be called the appellant; and the adverse party, the appellee.

§ 736 [878] **Summons when necessary—warning order—appointment of attorney.**
1. No summons of appellees shall be necessary, if the appeal be granted by the inferior court; or if the appellees enter their appearance in the Court of Appeals.

(27) Where several are jointly suable on the same contract for separate amounts, the aggregate claimed against all determines the jurisdiction. *Wilde v. Haycraft*, 2 Duv. 309.

(28) When several join in one action to assert distinct interests, the amount of the interest of each is the test, and the amounts claimed can not be added together to give jurisdiction. *Oswald v. Morris*, 92 Ky. 48.

(29) Jurisdiction of "this court only extends to the final orders and judgments of inferior courts, and not to the orders and judgments which judicial officers are authorized to make out of court." *Weddington v. Sloan*, 15 B. M. 147; *Gill on Petition*, 92 Ky. 118.

(30) Where the judgment against appellant is not sufficient to give court jurisdiction, will a counter-claim pleaded by him, and which there is no evidence whatever to support and which was dismissed, give jurisdiction? *Licking Rolling Mill v. Fischer*, 88 Ky. 176.

(31) See, as to jurisdiction and powers of Court of Appeals, Ky. Stat., secs. 949, 950 and page 547 of this Code.

(32) **Office, franchise or freehold.** Final order or judgment relating to may be appealed from. *Smith v. Cochran*, 7 Bush 147; *Cheek v. Com.*, 87 Ky. 42; *Johnson v. Com.*, 90 Ky. 53.

(33) **Orders and judgment that may be appealed from.** An appeal may be taken from an order made when the judgment is rendered, sustaining or discharging an attachment; secs. 266-267; or from an order appointing or refusing to appoint a receiver; sec. 298; or from a final judgment in the circuit or county court, allotting dower or dividing land. Sec. 499-12.

(34) From a judgment of the circuit court in proceedings under a writ of *ad quod damnum*. *Tracy v. E. & B. R. R.*

Co., 78 Ky. 309; by a purchaser at decretal sale from an order overruling exceptions filed by him to the confirmation of the sale. *Allen v. Graves*, 3 Bush 491; from an order of the circuit court refusing to allow a policeman one dollar, his attendance as a witness in a felony case. *Ex parte Herrick*, 78 Ky. 23.

(35) From a judgment making an allowance to the wife pending the suit for divorce; *Lochnane v. Lochnane*, 78 Ky. 467; or from an allowance made to the wife by way of alimony when the divorce is granted; *Beall v. Beall*, 80 Ky. 675; from an order disbarring an attorney; *Turner v. Com.*, 2 Met. 619; from an order of the county court removing the jailer; *Lowe v. Com.*, 3 Met. 237; from an order of the county court directing the collection of a tax assessed under a special act. *Bate v. Speed*, 10 Bush 644.

(36) From the judgment of the circuit court on an appeal from the county court, dismissing an application for a new road; *Helm v. Short*, 7 Bush 623; from an order sustaining a demurrer to the jurisdiction of the court; *Dudley v. High School*, 9 Bush 576; or sustaining a demurrer to a petition and dismissing it; *Com. v. Peters*, 4 Bush 403; from an order granting a new trial upon petition filed under sec. 518; *McCall v. Hitchcock*, 9 Bush 66, 7 Bush 615; from an order removing cause from State to Federal court; *Hall v. Ricketts*, 9 Bush 366; from an order confirming a report of sale; *Dawson v. Litsey*, 10 Bush 408; *Megowan v. Pennebaker*, 3 Met. 501.

(37) From a rule requiring a clerk to transfer attachment suit from one court to another, *Schroll v. Speed*, 14 Bush 186; from an order refusing to permit persons who file a petition for that purpose to be made parties, *Berry v. Hamilton*, 1 Bush 361; from a judgment of the

2. In all other cases, the appellees shall be summoned actually or constructively, pursuant to the provisions of chapter two of title four, to appear and answer the appeal.

3. For an appellee who is constructively summoned in the Court of Appeals [the clerk of] that court shall appoint an attor-

circuit court affirming administrator's settlement made in the county court, *Clark v. Lusk*, 1 Met. 447; from a judgment awarding damages on the dissolution of an injunction, *Offut v. Bradford*, 4 Bush 413; from a final order or judgment which relates to an office, franchise or freehold, *Smith v. Cochran*, 7 Bush 147; from a judgment on an invalid bail bond, *Pauer v. Simon*, 6 Bush 514; or upon service in another county than that in which the action is pending, *Ruby v. Grace*, 2 Duv. 540; or without service of process, *Long v. Montgomery*, 6 Bush 394.

(38) From a decision of the circuit court reversing or affirming a decision of the county court on an application for merchant's license, *Dougherty v. Com.*, 14 B. M. 239; from an order adjudging priority between claimants and refusing to substitute one party to the lien of another, *Hearn v. Lander*, 11 Bush 669; from an adverse judgment of the circuit court on the claim of a county creditor who has appealed from an order of the county court rejecting it, *Washington County v. Thompson*, 13 Bush 239. A nominated executor may appeal from an order of the circuit court rejecting a will. *Pryor v. Mizner*, 79 Ky. 232.

(39) From an order directing suit pending in another State to be dismissed, *Kelly v. Toney*, 95 Ky. 338; and from an order directing money withdrawn from court to be paid back, *City of Lou. v. Kaye*, 10 R. 160; and from a judgment in suit to settle decedent's estate that a person recover a certain amount to be paid out of assets, or directing sale of land to pay debts, *Chamberlain v. Chamberlain*, 13 R. 192; and from an order directing a homestead to be set apart before any sale was made to satisfy the debt, *Brittain v. Foley*, 7 R. 595.

(40) **Land.** Where either the legal or

equitable title to land is put in issue either party may appeal without reference to its value. *Hughes v. Swope*, 88 Ky. 254; *Moore v. Boner*, 7 Bush 26; *Caskey v. Lewis*, 15 B. M. 27; and the fact that pending the litigation the land has been converted into money does not affect the right of appeal. *Clements v. Waters*, 90 Ky. 96; but the title to land is not involved where the only question is as to priority between lien-holders. *Pittman v. Wakefield*, 90 Ky. 171.

(41) In action for trespass, where title is brought in issue, appeal lies, although amount in controversy is less than one hundred dollars. *Thacker v. Crawford*, 5 R. 764.

(42) **Mandamus.** Court of Appeals will issue writ of to compel circuit court to grant an appeal to a party entitled to it. *Kelley v. Toney*, 95 Ky. 338; *Schmidt v. Mitchell*, 95 Ky. 342; *Louisville School of Reform v. City of Louisville*, 88 Ky. 584.

(43) **Orders not final.** The quashal of a return upon a summons, *Wearen v. Smith*, 80 Ky. 216; judgment against a party directing him to pay a certain amount of money when further ordered, *Tinly v. Martin*, 80 Ky. 463; an order requiring the plaintiff to elect which of two causes of action he will prosecute, *Jones v. Johnson*, 10 Bush 649; order discharging an attachment on motion before final hearing, *Leet v. Lockett*, 4 Met. 56; 4 Met. 108; dissolving injunction and continuing case, *Rodman v. Forline*, 2 Met. 325; order remanding a case to a county from which it had been moved by change of venue, *Turner v. Browder*, 18 B. M. 825; an order made at the same term setting aside an order dismissing a petition, *Curd v. Dodds*, 6 Bush 681; can not be appealed from.

(44) **Decisions that can not be appealed from.** An order of the county court refusing to qualify a person as deputy sheriff, *Applegate v. Applegate*, 4 Met.

ney, whose duty it shall be to inform the appellee of the pendency of the appeal; and the court may allow him a reasonable compensation for his services, to be paid by the appellant and taxed as costs. (*Words in brackets inserted by act 1893.*)

236; nor can an order requiring an executor to give security until it is enforced, *Atwell v. Helm*, 7 Bush 504; nor can an order confirming biennial settlements made in the circuit court in an equitable action brought in that court by a guardian to enable him to settle his accounts from time to time, *Clark v. Anderson*, 10 Bush 99; nor can an order appointing a commissioner to ascertain facts in regard to alleged usury in a claim, *Pryor v. Smith*, 4 Bush 379; nor can an order for a rule against a surety in a bond given to discharge an attachment to show cause why he should not pay bond, *Inman v. Stratton*, 4 Bush 445; nor can an order overruling a motion to set aside the verdict of a jury when there has been no judgment on the verdict, *Rucker v. Pritchett*, 3 Bush 689.

(45) Decision that certain property is not subject to lien of mortgagee in a suit to settle a decedent's estate is not final, as court might afterward apply proceeds of sale of property to payment of debt. *Skillman v. Frost*, 4 R. 621; nor is opinion of court that party is not entitled to a homestead when possession of homestead is not disturbed and no judgment followed the opinion. *Smith v. Wilson*, 4 R. 719.

(46) Order filing a suit away is not final, *Nickell v. Fallen*, 11 R. 621; *Nickell v. Fallen*, 15 R. 300.

(47) Order confirming in part and rejecting in part a commissioner's report of settlement and referring case to him again for final adjustment is not final. *Vinson v. Freese*, 8 R. 350; nor is an order transferring a case from one State court to another invested with like jurisdiction. *Mercer v. Glass*, 89 Ky. 199.

(48) **Parties — privies.** Whoever is a party in the lower court, and would be a necessary party to any further proceedings after reversal, must be a party to the appeal, and if not made a party the appeal will be dismissed. *Murphy v.*

O'Reilly, 78 Ky. 263; by privies are meant heirs, executors and tertenants. *Barr v. Stevens*, 1 Bibb 203; *South v. Hoy*, 3 Bibb 523.

(49) **Payment of judgment.** Replevying or satisfying a judgment is not a waiver of the right to prosecute an appeal for its reversal. *Kellar v. Williams*, 10 Bush 216; see notes 1-3.

(50) **Prohibition.** Power of Court of Appeals to issue writ of is suggested, but not decided, in *Preston v. Fidelity Trust Co.*, 94 Ky. 295.

(51) **Presumption in favor of judgment.** The court will presume, unless the contrary appears, that the lower court committed no error. *Licking Rolling Mill v. Fischer*, 88 Ky. 176.

(52) **Refusal of judge to vacate bench** when proper affidavits are filed is a reversible error. *Massie v. Com.*, 93 Ky. 588; *German Ins. Co. v. Landram*, 88 Ky. 433.

(53) **Res judicata.** Every question presented upon an appeal must be taken to have been disposed of by the decision upon the appeal unless it be expressly left open for further litigation. *Smith v. Brannin*, 79 Ky. 114; and see *Davis v. McCorkle*, 14 Bush 746.

(54) "The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward." *Francis v. Wood*, 81 Ky. 16; and see further, notes 14-20 to sec. 368.

(55) Party who is in doubt as to proper remedy, and prosecutes two appeals at same time, will not, after the merits of the litigation have been determined in one of them by the Court of Appeals, be heard to complain of judgment on his other appeal. *Masonio Temple v. Com.*, 11 R. 383.

§ 737 (1879) **Transcripts how prepared — schedule.** Concerning transcripts of records to be used in the Court of Appeals—

1. *a. Clerk to copy record as directed by schedule.* The clerk of the court which renders a judgment shall copy the entire record, or parts thereof, according to the directions of the judge of the court, or of the parties to the appeal; and the filing of a schedule, as hereinafter authorized, shall be deemed a direction to copy the parts of the record therein mentioned.

b. Application of subsections eight and nine. The clerk shall be governed by the provisions of subsections eight and nine of this section, in making any transcript to which those provisions apply.

2. *Repealed.* [In cases to which the provisions of chapter three of title ten apply, the appellant, whether the appeal be granted by the inferior court, or by the clerk of the Court of Appeals, shall present to the judge of the inferior court his assignment of errors; the judge shall, by directions indorsed on, or annexed to, the assignment, order the clerk of the inferior court to copy such specified parts of the record as, in view of the alleged errors, may be material; and the appellant shall file said assignment and directions in the office of said last-mentioned clerk.] (*Words in brackets repealed by act of 1884.*)

(56) **Void judgment**—motion to correct must be made in lower court before appeal will lie. Sec. 763 and notes.

§ 737. (1) **Entire record, when only partial necessary.** An appeal will not be dismissed because a party brings the entire record up in a proceeding under chapter 3, title 10. If a party sees proper to bring the entire record he can do so, but he must pay the entire costs, although the judgment be reversed. *Murrell v. McAlister*, 78 Ky. 73.

(2) **Partial transcript.** Appellant may bring up so much of the record as he deems necessary to the determination of a question involved, but if it appears that portions of the pleadings or evidence bearing upon the question have been omitted the judgment will be affirmed. *Terrell v. Rowland*, 86 Ky. 67; *Brasfield v. Burgess*, 10 R. 660; 88 Ky. 176.

(3) "An appellant who prosecutes an appeal upon a partial transcript does so at his peril, and if it appears that part of the testimony used on the trial in

court below is not copied into the transcript it will be presumed in support of the judgment that it would sustain the averments of appellee's pleading." *Jones v. Jackson*, 13 R. 253; and that the omitted portions of record would support the judgment. *McKee v. Stein*, 91 Ky. 240; and that omitted pleadings would sustain instructions, 88 Ky. 176; and a party taking cross-appeal has right to file schedule and cause entire record copied; if he fail to do this it will be presumed that omitted record sustains judgment against him. *Adams v. Bement*, 16 R.—.

(4) It is not necessary that the record upon appeal should contain all the evidence heard on the trial to enable the Court of Appeals to determine that the court erred in giving a peremptory instruction for defendant; if there is any evidence in the record showing plaintiff's right to recover, the judgment will be reversed. *Com. v. Tate*, 89 Ky. 587.

(5) **Schedule — notice — partial record — cross-appeal.** So much of the Code as re-

3. *Entire record to be copied if appellees constructively summoned.* In all other cases in which the appeal is granted by the inferior court, if the appellees shall have been defendants in the action, and if any of them shall have been only constructively summoned, and have not appeared, in the action, and be not actually summoned to answer the appeal, the appellant shall order a transcript of the entire record.

4. In all other cases in which the appeal is granted by the inferior court—

a. *Schedule—time in which appellant to file—penalty for failure.* The appellant, within ninety days after the granting of the appeal, shall file in the office of the clerk of the inferior court [his assignment of errors, and] a schedule showing, concisely, what parts of the record he wishes to have copied. His failure to file said [assignment and] schedule within the time prescribed shall be cause for the dismissal of his appeal. (*Words in brackets repealed by act of 1884.*)

b. *Notice of filing of schedule—service of—appellee may file schedule.* After filing said [assignment and] schedule, the appellant may cause notice of the filing thereof to be served on the appellee, and to be returned to said office, as a summons is directed to be served and returned; and within twenty days after such service; or, if such notice be not served, within one hundred and twenty days after the granting of the appeal; or, whether such notice be served or not, at any time before completion of the transcript ordered by the appellant, and not afterward, the appellee may file in said office a schedule similar to that above described [and, if he wish to take a cross-appeal, he shall file with said schedule his assignment of cross-errors]. (*Words in brackets repealed by act of 1884.*)

quires the judge to direct what part of the record is to be copied must be regarded as repealed by the act repealing so much of the Code as required an assignment of errors. The appellant may still bring a part of the record by filing his schedule within ninety days from the time he prays the appeal, and the filing of the schedule with the clerk is all the notice required to be given to the appellee; but he will not be permitted to file a partial record unless he has filed his schedule within ninety days, and this rule applies as well to appeals in-

volving the settlement of estates as in ordinary cases. When the entire record is filed in time no schedule is necessary. If the appellee desires to prosecute a cross-appeal in this court he may file his schedule in the court below, either before or after the schedule is filed by the appellant. *L. & N. R. R. Co. v. Brice*, 83 Ky. 210.

(6) No time is fixed in which the schedule shall be filed when appeal is granted by clerk of Court of Appeals, nor is the failure to file in ninety days when appeal is so granted cause for dismissal of

c. Repealed. [If the appellee file an assignment of cross-errors the appellant, within forty days after service of notice upon the appellee as aforesaid; or if notice be not served, within one hundred and thirty days after the granting of the appeal; or whether such notice be served or not, at any time before completion of the transcript ordered by the appellee, and not afterward, may, with reference to the cross-appeal, file an additional schedule similar to that above described.] (*Words in brackets repealed by act of 1884.*)

5. *Appeal granted in Court of Appeals—when partial—transcript sufficient.* Excepting the cases provided for by subsection two of this section, if an appeal be granted by the clerk of the Court of Appeals, and if the appellees be actually summoned to appear to the appeal; or, if, being *femes covert* or free from disability, they enter their appearance to the appeal, the appellant may order a transcript of the entire record or of parts thereof.

6. *Appeal granted in Court of Appeals—entire record to be copied—when.* In all other cases in which an appeal is granted by the clerk of the Court of Appeals, the appellant shall order a transcript of the entire record.

7. *Appeal granted in Court of Appeals—duty of appellant desiring partial record.* If the appellant, to whom an appeal is granted by the clerk of the Court of Appeals, choose to file a transcript of a part only of the record—

a. Schedule to be filed—notice of. He shall file in the office of the clerk of the inferior court [his assignment of errors, and] a schedule similar to that above described; and shall cause notice of the filing thereof to be served on the appellees, and to be returned to said office, as a summons is directed to be served and returned. (*Words in brackets repealed by act of 1884.*)

b. Appellee may file schedule. Within twenty days after service of such notice, or at any subsequent time before completion of the

appeal, but it should be filed a sufficient length of time before the end of the period within which the transcript is required to be filed to give the notice required by subsection 7 a. b. of section 737. *Wearen v. Smith*, 80 Ky. 216.

(7) When appeal is granted by lower courts schedule must be filed within ninety days after appeal is granted, or appeal will be dismissed; and where appeal is granted by clerk of Court of Appeals

(34)

schedule may be filed within ninety days from time appeal is so granted. *Adams v. Bement*, 16 R.—.

(8) Schedule must be filed within ninety days from the granting of the appeal, and extending time to prepare and file a bill of exceptions does not extend time in which to file schedule, nor prevent appellant from filing schedule within the prescribed time. *Wright v. Woolfolk*, 14 Bush 308.

transcript ordered by the appellant, and not afterward, the appellee may file in said office a schedule similar to that above described [and an assignment of cross-errors], if he wish to take a cross-appeal. (*Words in brackets repealed by act of 1884.*)

c. Repealed. [If the appellee file cross-errors, the appellant, within forty days after service of the notice mentioned in subdivision *a* of this subsection, or at any subsequent time before completion of the copy ordered by the appellee, and not afterward, may file, with reference to the cross-appeal, an additional schedule similar to that above described.] (*Words in brackets repealed by act of 1884.*)

8. *Section 335 applicable.* The provisions of subsection three of section three hundred and thirty-five shall apply to all transcripts made by clerks.

9. *Subpœna duces tecum—duty of clerk.* If a *subpœna duces tecum*, issued pursuant to section seven hundred and forty-three, subsection two, be delivered to the clerk of the inferior court before he shall have copied the part of the record therein mentioned, he shall transmit such part instead of a copy thereof, though a copy thereof may have been ordered by the judge of the inferior court, or by a party to the appeal.

10. *Schedule notice and return to be copied in transcript.* The above-mentioned directions of the judge [assignments of error], schedules and notices and returns thereon shall, when filed in the office of the clerk of the inferior court, constitute part of the record; but shall not be spread at large on the order-book; and shall be copied in the transcript. (*Words in brackets repealed by act of 1884.*)

11. *Cost of copy of unnecessary papers paid by party ordering.* A clerk who copies papers which do not constitute part of a record, unless required to do so by a judge or a party; and a party

(9) **Transcript—duty of clerks—index.** As to when clerk of inferior court may be required to deliver transcript without pay, see note 4, to sec. 671; and *Houston v. Ducker*, 86 Ky. 123.

(10) Where the clerk of the Court of Appeals has allowed a party, or his counsel, to use the original transcript in a case under an agreement to pay therefor, as if a copy had been actually made, and the party thus using the record is successful, he is entitled to have the cost of a copy taxed as a part of his cost

against the unsuccessful party. *Parrish v. Ferguson*, 83 Ky. 18.

(11) Liability of clerk for refusing to make transcript. *Houston v. Wandeloher*, 12 R. 345; record condemned because index defective, 94 Ky. 191.

(12) **What record should show.** The appellant must exhibit in the transcript so much of the record as will show affirmatively that the decision complained of is erroneous. When the transcript shows that the record contained a paper which may have contained matter that would

who requires a clerk to copy such papers, or immaterial parts of a record, shall pay the costs resulting therefrom, to be adjudged by the Court of Appeals upon or without motion.

12. *Certificate of clerk to record index—exhibits.* At the close of the transcript, the clerk shall certify, in substance, that it contains a true and complete copy of the record, or of such parts thereof as he may have been required to copy, according to the truth; and shall append an index referring, consecutively, to the pages on which the copy of each pleading, or other separate part of the record, commences; and describing briefly the exhibits, if any.

13. *Transcript made according to this section regarded as complete record—exception.* Subject to the provisions of sections seven hundred and forty-two and seven hundred and forty-three, transcripts and transmissions of parts of records, made pursuant to the foregoing provisions of this section, shall constitute complete records for the purposes of appeals.

§ 738. *Time in which transcript must be filed.* The appellant shall file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, unless the court extend the time; as, for cause shown, the court may do. (*See further as to time to file transcript, sec. 745.*)

§ 739. *Statement to be filed with transcript by appellant.* It shall be the duty of the appellant to file with the transcript—

1. A statement showing—

a. The names of the appellants, accompanied by the word “appellants.”

b. The names of the appellees, accompanied by the word “appellees;” or the words “unknown appellees,” if their names be unknown.

sustain the decision the appellant must include such paper, or this court will presume the decision appealed from to have been correct. *Huffaker v. Bank*, 13 Bush 644; *Bowman v. Holloway*, 14 Bush 426.

§ 738. (1) *Time to file transcript.* When a transcript has in good faith been filed and is defective or contains only a part of the record, a supplemental record may be filed at any time before submission. *Bush v. Lisle*, 86 Ky. 504.

(2) The proper practice is to ask further time to file transcript when it

can not be filed within time allowed by Code, but when the appellant is ready to perfect the record when motion to dismiss is made or before dismissal, the court will permit him to do so. 86 Ky. 504.

(3) This section is applicable to appeals granted by clerk of Court of Appeals. *Wearen v. Smith*, 80 Ky. 216.

§ 739. (1) *Non-resident—attorney for.* The clerk of the Court of Appeals has no authority to appoint a corresponding attorney. The appointment must be made by the court. The affidavit must state

c. The term or day when the judgment appealed from was rendered, and the page of the record on which it may be found.

d. Whether or not the appellant wishes to have a summons issued, or a warning order made; and, if any, for whom and to what county the summons shall be issued; and against whom the warning order shall be made.

2. An affidavit conforming to sections fifty-seven and fifty-eight, if a warning order be desired.

[3. The appellant's assignment of errors, unless he shall have filed it in the clerk's office of the inferior court pursuant to the provisions of section seven hundred and thirty-seven.] (*Words in brackets repealed by act of 1884.*)

§ 740. **Statement must be filed before appeal docketed.** No appeal shall be docketed by the clerk until the appellant complies with the provisions of section seven hundred and thirty-nine, and if he fail to file the transcript within the time allowed by section seven hundred and thirty-eight, or by the court pursuant thereto, his appeal shall be dismissed.

§ 741 [1880] **Appellee may file copy of record.** The appellee may file an authenticated copy of the record in the clerk's office of the Court of Appeals with the same effect as if filed by the appellant.

§ 742 [1881] **Writ of certiorari—when may be issued.** If any party to an appeal file in the clerk's office of the Court of Appeals his affidavit, or that of his attorney, that the judge of the inferior court has refused or failed to order the clerk, as is authorized by subsection two of section seven hundred and thirty-seven, to copy a material part of

that the person against whom the warning order is desired is a non-resident of this State, and believed to be absent therefrom. The court will not dismiss the appeal because the affidavit is defective, but will quash the warning order. *Arthurs v. Harlan*, 78 Ky. 138.

(2) This section applies to appeals granted by clerk of Court of Appeals. *Wearen v. Smith*, 80 Ky. 216.

§ 742. (1) **Defects in record—how supplied.** When the record is defective by reason of a clerical misprision time will be given by the court to have it corrected and brought up by *certiorari*. *Williams v. Thompson*, 80 Ky. 325.

(2) A rehearing will not be granted in order to enable the parties to perfect the transcript, *Yeager v. Groves*, 78 Ky. 278; *Christopher v. Searcy*, 12 Bush

171; but in *Doty v. Trustees*, 12 R. 964, where a judgment was reversed because of failure to serve summons, the appellee was afterward permitted to have record corrected by showing that process was executed and the case was then affirmed; and see *Stanford v. Parker*, 12 R. 878, where court refused to permit party to have error corrected; the circumstances however being different from *Doty* case; and in *Long v. Kerrigan*, 13 R. 433, the court permitted record to be corrected.

(3) The Court of Appeals will, of their motion, award a *certiorari* to the clerk of the inferior court where there is a strong presumption from the facts appearing in the record that the clerk has copied a paper erroneously. *Franklin v. Hall*, 16 B. M. 472.

the record—which shall, in general terms, be described in the affidavit—or shall file in said office a statement of himself, or of his attorney, that the clerk of the inferior court has refused or failed to copy a part of the record which a judge pursuant to subsection two of section seven hundred and thirty-seven, or which a party pursuant to subsections three, four, five, six or seven, of section seven hundred and thirty-seven, may have ordered to be copied—which parts of the record shall, in general terms, be described in the statement—the clerk of the Court of Appeals shall, upon the application of such party, issue a writ of *certiorari*, describing, in general terms, such omitted parts of the record, and commanding the clerk of the inferior court, forthwith, to transmit copies thereof to the Court of Appeals.

§ 743 (1932) **Court may issue certiorari or order original papers filed.** 1. If the appellees, having been defendants in the original action in the inferior court, be under any disability, other than coverture, or infancy and coverture combined, the Court of Appeals may, by writ of *certiorari* directed to the clerk of the inferior court require him to transmit a transcript of such parts of the record as the parties may have failed to require him to copy.

2. The Court of Appeals, if satisfied that a view of any part of a record may be important to a correct decision of an appeal; or that the copying of any part of a record would cause great and unnecessary cost or delay, may, by a writ of *subpoena duces tecum* directed to the clerk of the inferior court, cause him to transmit such part of the record to the clerk of the Court of Appeals. It shall be identified by the clerk of the inferior court, by his certificate indorsed thereon or appended thereto; and, after the cause shall have been decided by the Court of Appeals, shall be returned by its clerk to the clerk of the inferior court, and be kept by him subject to the order of the inferior court. The cost of such transmission and return shall be paid by the party at whose instance the transmission is made, and be taxed as part of the costs.

§ 744 (1932) **Costs—appellant may be required to secure.** The appellant may be required to give security for costs, as plaintiffs in civil actions may be so required (*See as to security for costs, sec. 616.*)

§ 743. **Subpoena duces tecum.** The court will not grant the writ of *subpoena duces tecum* that the original bill may be inspected unless there is an affidavit that the instructions embodied in the bill were not those offered, given or refused by the court on the trial, and so with reference to any exhibit made part of

the bill of exceptions. *Meaux v. Meaux*, 81 Ky. 475; see further, notes to sec. 742.

§ 744. (1) **Costs.** An attorney prosecuting an appeal for a non-resident defendant is not liable for costs. *Christmas v. Russell*, 2 Met. 112.

(2) Appellants may be required to give security for costs where they would

§ 745 [334] **Limitation of right to appeal.** An appeal shall not be granted except within two years next after the right to appeal first accrued, unless the party applying therefor was then a defendant in the action, and an infant not under coverture; or of unsound mind; or a prisoner who did not appear by his attorney—in which cases an appeal may be granted to such parties, or their representatives, within one year next after their deaths or the removal of their disabilities, whichever may first happen. (*See further as to time to appeal, sec. 738.*)

§ 746 [335] **Tax on appeals.** The tax on an appeal shall be one dollar.

CHAPTER II.

SUPERSEDEAS ON APPEALS.

§ 747. Supersedeas to stay proceedings—practice as to injunctions.

§ 748. Supersedeas bond—conditions of.

§ 749. Clerk who shall take bond and issue supersedeas.

§ 750. Supersedeas may be discharged if bond insufficient.

§ 751. Part of judgment may be superseded.

§ 752. Supersedeas defined.

§ 747 [336] **“Supersedeas to stay proceedings—practice as to injunctions.** An appeal shall not stay proceedings on the judgment unless a superse-

if plaintiffs be so required. *Paducah Hotel Co. v. Long*, 92 Ky. 278.

§ 745. (1) **Infants — limitation.** Where a decree was rendered at the joint instance of several parties, some of whom were adults and some infants, one of the infants could not alone prosecute an appeal when the right of all the others to appeal had been barred. The right of appeal in such case being barred as to one was barred as to all. *Helm v. Bentley*, 1 Met. 510. Nor can the wife appeal from a joint judgment against herself and husband when his right to appeal is barred. *Farlee v. Rodes*, 11 Bush 365.

(2) **Infants—appeal by.** An infant may appeal at any time before arriving at the age of twenty-one, but such appeal will be a bar to any appeal after arriving at age. *Moss v. Hall*, 79 Ky. 40; and see note 5 to sec. 391.

(3) **Guardian *ad litem*** may prosecute an appeal in the name of and for the infants, although the statutory guardian

has accepted the amount adjudged in their favor by the circuit court. *Reed v. Bridge Co.*, 8 Bush 69.

(4) **Limitation must be pleaded.** Where an appeal is sought to be dismissed on the ground that it is barred by limitation, the statute must be pleaded. A motion to dismiss will not be considered. *Riley v. Reed*, 13 Bush 411.

(5) **Time—how computed.** It was held under a statute providing that an appeal should not be granted “except in three years after the judgment,” that the day on which judgment was rendered must be counted. *Chiles v. Smith*, 13 B. M. 461.

§ 746. **Tax on appeal.** It is the duty of the clerk to require the tax to be paid before he grants appeal or files the record, but his failure to require payment of tax will not be cause for dismissing appeal. *Emerson v. Dye*, 81 Ky. 660.

§ 747. (1) **Cross-appeal—supersedeas.** Appellee who prosecutes a cross-appeal may supersede the judgment on his cross-

deas be issued. The provisions of the Civil Code concerning supersedeas on appeals shall not apply to judgments granting, modifying, perpetuating or dissolving injunctions. When an appeal shall be taken from any judgment granting, modifying, perpetuating or dissolving any injunction, the court which rendered the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying or continuing the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as may be proper for the security of the rights of the opposite party. Either party, within twenty days after the entry of such order, may take a transcript of the record, or all parts thereof appertaining to the injunction, and upon reasonable notice in writing to the opposite party, move the Court of Appeals, or, if in vacation, any judge thereof, to revise the order of the lower court, and finally determine how far the injunction shall be suspended, modified or continued pending the appeal. Pending such application to the Court of Appeals or judge thereof, but not longer than for twenty days, the status existing immediately before the entry of the judgment appealed from shall be maintained, and the lower court shall so provide in the judgment upon the request of either party. If, at any time, upon reasonable notice to the party affecting, it may be made to appear that the sureties upon the bond required in the court below are insufficient, the Court of Appeals, or a judge thereof in vacation, may set aside the order suspending, modifying or continuing the injunction pending the appeal, unless sufficient surety be furnished by a day fixed by the court or judge." (*Sec. as amended by act of 1894.*)

appeal, but the bond must be approved by the court and not the clerk. *Cov. Transfer Co. v. Piel*, 9 R. 665; and where appellee supersedes judgment and prevents appellant from enjoying benefit of his judgment he is not entitled to the ten per cent damages ordinarily allowed. *Cov. Transfer Co. v. Piel*, 87 Ky. 267; when judgment is affirmed on original and reversed on cross-appeal appellee is not entitled to damages. *Wade v. First Nat. Bank*, 11 Bush 607, and see note 10, sec. 757.

(2) **Discharge of supersedeas.** Where an appeal is prayed in the lower court, and a supersedeas bond executed in that court and an order of supersedeas issued, if that appeal is abandoned and an appeal granted by the clerk of the Court of

Appeals, the appellee is entitled, upon motion made in the Court of Appeals, to have the supersedeas discharged with damages. *City v. Elrod*, 14 Bush 216.

(3) **Order of supersedeas must issue.** Damages will not be awarded on the affirmance of the judgment unless an order of supersedeas is issued. The judgment is not superseded by the execution of the bond, nor until the order of supersedeas has issued. *Reed v. Lander*, 5 Bush 598; *Jones v. Green*, 12 Bush 127.

(4) The law does not require any record of the issuance of the order of supersedeas, and when the bond has been executed, unless it appears that no order of supersedeas was issued, the presumption will be that one was issued, and this pre-

§ 748 [1887] **Supersedeas bond—conditions of.** A supersedeas shall not be issued, until the appellant cause to be executed before the clerk of the court which rendered the judgment, or the clerk of the Court of Appeals, by one or more sufficient sureties, to be approved by such clerk, a bond to the effect that the appellant shall pay to appellee all costs and damages that shall be adjudged against the appellant on the appeal; also, that he will satisfy and perform the judgment

sumption will not be overcome by the certificate of the clerk that he does not remember to have issued the order. *Whitehead v. Boorum*, 7 Bush 399.

(5) See further, notes to secs. 748, 749.

§ 748. (1) Appellant is not required to sign bond. *Gilpin v. Hord*, 85 Ky. 213.

(2) **Cross-appeal—supersedeas.** See note 1, sec. 747.

(3) **Damages.** Where a judgment for money which is superseded does not bear interest, the plaintiff, in an action on the bond, is not entitled to interest by way of damages; he is only entitled to the ten per cent damages allowed by sec. 764. *L. & N. R. R. v. Sharp*, 91 Ky. 411; and see note 1, sec. 747.

(4) **Effect of.** Whether or not the appeal is properly prosecuted is a question for the Court of Appeals to determine, and until it has passed on the question the supersedeas stays proceedings on judgment. *Daugherty v. Ringo*, 1 R. 272.

(5) After a supersedeas bond has been executed and supersedeas issued, the appellee has no power to bring a suit on the judgment or otherwise enforce its collection pending the appeal. His remedy is on the bond. *Johnson v. Williams*, 82 Ky. 45.

(6) **Injunction—mandamus.** It was held in *Smith v. W. U. T. Co.*, 83 Ky. 269; *K. & I. Bridge Co. v. Krieger*, 91 Ky. 625; and *E. R. R. Co. v. Ashland R. Co.*, 94 Ky. 478, that where an injunction was dissolved the execution of a supersedeas bond and service of the order left the injunction in full force. See now sec. 747 as amended; and the execution of a writ of mandamus may be stayed by supersedeas. *Atchison v. Lucas*, 83 Ky. 451.

(7) **Judgment in personam and in rem—cross-appeal.** Where in an action to en-

force a lien on land judgment is rendered for the debt and for a sale of the property, if the entire judgment is superseded the plaintiff is entitled to damages upon the affirmance of the personal judgment, although the judgment for the sale of the property is reversed. *Leopold v. Furber*, 84 Ky. 214. When the judgment is affirmed on the original and reversed on the cross-appeal, the appellee is not entitled to damages. *Wade v. First Nat. Bank*, 11 Bush 697.

(8) **Obligors in bond—liability of.** In a contest between two creditors over a fund due their common debtor, the obligors in bond of creditor who superseded judgment directing payment of fund to the other creditor are liable for amount of judgment. *Mahlman v. Williams*, 89 Ky. 282.

(9) After an execution issued on a replevin bond had been levied on sufficient property of the principal to pay it, the judgment was superseded, and the collection of the execution stayed. The judgment being affirmed, the surety in the replevin bond was compelled to pay it, the principal being then insolvent. Held that he could recover the amount so paid from the surety in the supersedeas bond. *Kellar v. Williams*, 10 Bush 216.

(10) A recovered a judgment against B; B filed petition in equity and enjoined the collection of the judgment. The injunction was dissolved; B appealed and executed supersedeas bond. The judgment being affirmed it was held that the surety in the bond was not liable for the amount of the judgment. *Steele v. Wilson*, 9 Bush 699.

(11) Where a party could be proceeded against in the county court, independent of a judgment in the circuit court which he had superseded, he was not liable on

appealed from, if it should be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment, and all rents, or hire, or damages to property, during the pendency of the appeal, of which the appellee is kept out of possession by reason of the appeal. (*Form of supersedeas and bond, page 650.*)

§ 749 [888, 889] **Clerk who shall take bond and issue supersedeas.** 1. The bond must be executed before the clerk of the court rendering the judgment, if the appeal be granted by that court. In other cases, it must be executed before the clerk of the Court of Appeals.

2. The clerk of the court rendering the judgment shall issue the supersedeas, if the bond be executed before him before the expira-

the supersedeas bond executed to stay proceedings in the circuit court, except for such damages as may have resulted from the stay of proceedings on the judgment appealed from. *Roberts v. Jenkins*, 80 Ky. 666.

(12) The appellee may sue on the bond without issuing execution on his judgment against the defendant, but if he causes execution to issue and it is levied on the defendant's property, if the levy is released by the appellee, the surety in the bond will be released. *Dills v. Cecil*, 4 Bush 579. As to correction of bond by lower court at term at which it is executed, see *Ross v. Wilson*, 7 Bush 29.

(13) A surety in a bond superseding a judgment rendered against several is liable if the judgment is affirmed as to any one of them. *Bridgford v. Fogg*, 12 R. 570; *Gilpin v. Hord*, 85 Ky. 213.

(14) Surety of cotenant in possession of premises, who superseded judgment of partition, is liable for the value of the rents of the property between execution of bond and affirmance of judgment. *Armstrong v. Bryant*, 13 R. 128.

(15) It is not necessary in order to recover on bond that the court should award damages upon the affirmance; in the absence of an order allowing damages, the sureties are liable for the judgment, interest and costs. *Gilpin v. Hord*, 85 Ky. 213.

(16) **Personal representative.** A personal representative is not bound personally on

a supersedeas bond executed by him in his representative capacity, and is bound only to pay the damages and costs of the appeal and the judgment in case of affirmance out of the assets which have or may come to his hands in the due course of administration. *Fitzpatrick v. Todd*, 79 Ky. 524.

(17) **Void order granting appeal.** Where the lower court granted the appeal at the succeeding term after judgment was rendered, the order was void, and the appellee is not entitled to damages on the bond as a statutory obligation; whether it is valid as a common law bond not determined. *American Accident Co. v. Reigart*, 92 Ky. 142; and an appeal and order of supersedeas granted by clerk of Court of Appeals before expiration of term of lower court at which judgment was rendered are void and may be disregarded. *Schmidt v. Mitchell*, 95 Ky. 342.

(18) **Wrong officer—execution of bond before.** Although the clerk who took bond and issued supersedeas had no authority to do so, if the supersedeas had the effect to stay proceedings on the judgment the obligors in bond are liable. *Spooner v. Best*, 8 R. 185.

§ 749. (1) **Issuing of supersedeas.** A supersedeas can not be issued by the clerk of the court rendering the judgment unless an appeal was granted by that court. *Jones v. Green*, 12 Bush 127.

(2) See further, as to who must grant appeal and take bond, note 17, sec. 748.

tion of the time for filing a copy of the record in the clerk's office of the Court of Appeals pursuant to section seven hundred and thirty-eight. In other cases, it must be issued by the clerk of the Court of Appeals.

§ 750 (800) **Supersedeas may be discharged if bond insufficient.** The appellee may move the Court of Appeals, if in session; or, on reasonable notice to the appellant, may move a judge of said court in vacation, to discharge the supersedeas; and, if the court or judge shall consider the sureties insufficient, or the bond substantially defective in securing the rights of the appellee, the court or judge shall make an order discharging the supersedeas, unless a good bond with sufficient sureties be forthwith executed. The order, if made by a judge, shall be in writing and signed by him; upon the filing of which, or of a certified copy of order, if made by the court, in the clerk's office of the inferior court, executions and other proceedings for enforcing the judgment may be immediately taken, as if no supersedeas had been issued. But another supersedeas may be issued by the clerk of the Court of Appeals upon the execution of a new and lawful bond, with sufficient sureties, as hereinbefore provided.

§ 751 (801) **Part of judgment may be superseded.** The supersedeas may be issued to stay proceedings on a part of a judgment, and in such case the bond shall be varied so as to secure the part superseded.

§ 752 (802) **Supersedeas defined.** The supersedeas is a written order, signed by the clerk, commanding the appellee and all others to stay proceedings on the judgment or order.

CHAPTER III.

TRIAL AND DECISION.

- § 753. Appeal—when stands for trial.
- § 754. Docket arranged, printed, distributed by clerk.
- § 755. Cross-appeal—how taken.
- § 756. Error must be substantial to authorize reversal—additional transcript.
- § 757. Dismissal of appeal—enforcement of judgment, effect on appeal.
- § 758. Pleading to show cause for dismissal of appeal.
- § 759. Appeal taken for delay—motion to affirm.
- § 760. Rules of court—mandate, when to issue.
- § 761. Proceeding in lower court upon return of case.
- § 762. Mandates—power of court to enforce.
- § 763. Judgments that court will not reverse.
- § 764. Damages upon affirmance.
- § 765. Written opinions to be delivered.
- § 766. Reporter of court and duties.
- § 767. Provisions concerning revivor applicable.

§ 753 [893] **Appeals—when stand for trial.** Appeals shall stand for trial during the first term twenty days before which the transcript is filed in the clerk's office, if—

1. The appeal be granted by the inferior court; or,
2. The appearance of the appellee be entered five days before the day on which the case is set for trial on the docket; or,
3. The appellee be summoned actually twenty days, or constructively thirty days, before said day.

§ 754 [894] **Docket arranged, printed, distributed by clerk.** 1. The clerk shall arrange the appeals upon the docket, setting a proper number for each day of the term; and in arranging them may have due regard to the convenience of litigants, in placing together the appeals from the several judicial districts.

2. He shall, at least fifteen days before each term, furnish a copy of the docket to the public printer; who shall immediately print not less than five hundred copies thereof, and send one of said copies to the clerk of each circuit court, chancery court and court of common pleas, for public use; and the claim of the printer shall be approved and certified by the court, and be paid as other claims upon the treasury.

§ 755 [895] **Cross-appeal—how taken.** 1. The appellee [if he have filed

§ 755. (1) **Cross-appeal.** If a cross-appeal is desired the appellee may file his schedule in the court below, either before or after the schedule is filed by the

appellant. No schedule is required when the entire record is copied. *L. & N. R. R. Co. v. Brice*, 83 Ky. 210; but party taking cross-appeal has right to

an assignment of errors in the clerk's office of the inferior court, pursuant to the provisions of subsections four and seven of section seven hundred and thirty-seven; or, in any case, upon filing such assignment in the Court of Appeals] may obtain a cross-appeal, at any time before trial, by an entry on the records of the Court of Appeals. (*Words in brackets repealed by act of 1884.*)

[2. The failure of the appellee to take a cross-appeal after assigning cross-errors pursuant to the provisions of subsections four or seven of section seven hundred and thirty-seven, and not otherwise, shall bar his right to an appeal.] (*Words in brackets repealed by act of 1884.*)

3. The failure of an appellant to prosecute an appeal, or his dismissal of it [after the appellee shall have assigned cross-errors pursuant to the provisions of subsections four or seven of section seven hundred and thirty-seven, or subsection one of this section], shall not prevent the appellee from prosecuting a cross-appeal. (*Words in brackets repealed by act of 1884.*)

§ 756 [1906] **Errors must be substantial to authorize reversal—additional record may be filed.** 1. [Every appellant or cross-appellant must, by his assignment of errors, specify the particular errors on which he means to rely; and

file schedule and cause entire record copied, and if he fail to do this it will be presumed that omitted record will sustain judgment against him. *Adams v. Bement*, 16 R.—

(2) A cross-appeal can not be considered when the parties to be affected by it are not before the court. *Daviess Co. v. Howard*, 13 Bush 101.

(3) "The legal effect of the affirmance on the original appeal, there being a reversal of the judgment on the cross-appeal, was not to leave the judgment unreversed, but to decide that there was no error to the prejudice of the appellant, and that he was not entitled to a reversal." In such case the appellee is not entitled to damages on the bond executed by the appellant. *Wade v. First National Bank*, 11 Bush 697.

(4) Cross-appeal is only allowable in behalf of the appellee against the appellant and not against a co-appellee. *Smith v. Bank*, 1 Met. 575; *Gaar v. Banking Co.*, 11 Bush 180; *Home Ins. Co. v. Gaddis*, 3 R. 159.

(5) When either party appeals from a

final judgment his adversary may have a cross-appeal for the purpose of correcting any error to his prejudice or any interlocutory order that controlled or influenced the judgment, but he can not have a cross-appeal from a judgment wholly distinct from the judgment appealed from. *Brown v. Vancleave*, 86 Ky. 381.

(6) Cross-appeal can not be granted by circuit court. *Murphy v. Blandford*, 11 R. 125; it must be granted by Court of Appeals. *Mud v. Mullican*, 11 R. 417.

(7) Appellee prosecuting cross-appeal may supersede judgment on his cross-appeal, but the bond must be approved by court and not clerk. *Cov. Transfer Co. v. Piel*, 9 R. 665; and see note 1, sec. 747.

(8) Cross-appeal must be heard with the original appeal. 9 R. 665.

§ 756. (1) **Change in law.** A judgment which was right when rendered will not become erroneous by a subsequent change in the law, and will not for such reason be reversed. *Parrish v. Hill*, 2 Duv. 396.

no others shall be passed upon by the court], nor shall a judgment be reversed or modified, except for an error to the prejudice of the substantial rights of the party complaining thereof; but the Court of Appeals may, on motion, after ten days' notice to the adverse party,

(2) **Costs on appeal.** As to discretion of court in awarding see Ky. Stat., sec. 891, and *Counts v. Kitchen*, 87 Ky. 47. As to effect of tender before appeal taken, see Ky. Stat., sec. 800.

(3) **Error must be substantial.** To authorize a reversal the error complained of must affect the substantial rights of the appellant, and that it does so affect them must as clearly appear as the error itself. *Williams v. Rogers*, 14 Bush 776. And the Court of Appeals will presume that the decision of the lower court is correct, unless it affirmatively appears from the record that the decision complained of is erroneous. *Huffaker v. Bank*, 13 Bush 644; *Bowman v. Holloway*, 14 Bush 426.

(4) A judgment against a divorced wife, and also against her late husband, for her debt; as to him, to be levied on any property received from her during marriage, although erroneous as to him is not prejudicial to her. *Joyes v. Hamilton*, 10 Bush 544.

(5) An error in not directing the commissioner to sell only enough land to pay the debt will not be available when the entire tract sold for less than the amount of the debt. *Doughty v. Moss*, 1 Bush 161.

(6) Although a deposition was erroneously rejected, the court will consider the effect of it, and if, when admitted, it would not change the result, the case will not be reversed on that ground. *Walrath v. Viley*, 1 Bush 266; *Millett v. Parker*, 2 Met. 608; *Tudor v. Tudor*, 17 B. M. 383. So with evidence rejected. *Smith v. Bank*, 1 Met. 575.

(7) The refusal of the court to allow a party to testify will not authorize a reversal when it does not appear that he would have stated any fact beneficial to himself. *Francis v. Com.*, 3 Bush 4.

(8) Refusal of court to pass upon exceptions to depositions on the ground that they are incompetent and irrelevant will not warrant a reversal, when the

depositions are competent and relevant. *Root v. Merriwether*, 8 Bush 397. Nor is an error in overruling a demurrer to a pleading prejudicial when no instruction based on the pleading is given. *Beaven v. Phillips*, 83 Ky. 88.

(9) An error in refusing to strike out irrelevant matter in a pleading will not warrant a reversal unless it appear that the party was prejudiced by the error. *Buckles v. Lambert*, 4 Met. 330.

(10) An error of five dollars in amount of judgment is too small to authorize a reversal. *German Ins. Co. v. Landram*, 88 Ky. 433; as is an error of thirty-five dollars in a case involving many thousands. *Seiler v. Northern Bank*, 86 Ky. 128. Nor will an error of six dollars and fifty cents in the judgment against the appellant justify reversal. *Moore v. Estes*, 79 Ky. 282.

(11) **Joint and several judgment.** A judgment against persons jointly liable is an entirety, and if void as to one is void as to all; but where it is several as to the parties it may be reversed as to one and affirmed as to another. *Joyes v. Hamilton*, 10 Bush 544.

(12) **Judgment correct, but reason wrong.** A correct judgment must be affirmed, although it may have been erroneously made, to rest on a different ground by the lower court. *Poor v. Robinson*, 13 Bush 200; or given for a wrong or insufficient reason. *Ireland v. Berryman*, 3 Bush 356; *American Nail Co. v. Bayless*, 91 Ky. 94.

(13) **Reversal with direction to enter judgment** in a common law case is not an invasion of the right of trial by jury where the evidence wholly fails to sustain the verdict rendered. *Rosenfield v. Goldsmith*, 11 R. 662; and court may, when a new trial has been granted and there is an appeal from second judgment, direct entry of first judgment. *Couadeau v. Am. Acc. Co.*, 95 Ky. 280; in *Mendenhall v. Tungate*, 95 Ky. 208, in

or his attorney, allow a party to file a transcript of an additional portion of the record. (*Sec. as amended by act 1880; words in brackets stricken out by act 1884.*)

§ 757 ⁽¹⁸⁸⁷⁾ **Dismissal of appeal—enforcement of judgment, effect on appeal.** If it appear from the record that an appeal was improperly granted, or that the appellant's right to prosecute it further has ceased, the appellee may, upon stating the grounds, in writing, move the court to dismiss the appeal. The motion shall not be heard without the

reversing a will case the court directed county court to reject will.

(14) **Three verdicts.** Where there have been three verdicts for the same party the court will not disturb the last one, although the weight of evidence is against it. *L. & N. R. Co. v. Graves*, 78 Ky. 74; *Sandford v. Smith*, 5 Bush 471. See sec. 341.

(15) **Verdict against evidence.** The court will not reverse on the ground that the verdict is not sustained by the evidence, unless it is clearly and palpably against the weight of evidence. *Sandford v. Smith*, 5 Bush 471; *Becker v. Crow*, 7 Bush 198; *Varble v. Bigley*, 14 Bush 698; *Com. v. Williams*, 14 Bush 297.

(16) The judgment of the court, when the law and facts are submitted to the court, will not be disturbed unless flagrantly against the evidence. *Helm v. Coffey*, 80 Ky. 176; *Russell v. M. & C. T. Co.*, 13 Bush 307; *Coleman v. Meade*, 13 Bush 358; 12 Bush 451; 12 Bush 469; and see note 1, sec. 10.

(17) **Waiver of error.** No error can be taken advantage of on the appeal unless it was relied upon in the grounds for a new trial. *Com. v. Williams*, 14 Bush 297; *McLain v. Dibble*, 13 Bush 297; *Alexander v. Humber*, 86 Ky. 565. See further, notes to secs. 333, 335, 340.

(18) Unless there is a motion and grounds for a new trial there is nothing before the court except the sufficiency of the pleadings. *Helm v. Coffey*, 80 Ky. 176; *Henderson v. Dupree*, 82 Ky. 678; *Harper v. Harper*, 10 Bush 447; see further, note 31 to sec. 340.

(19) In an action attacking a conveyance as fraudulent, it is too late to object for the first time in Court of Appeals that plaintiff did not have a "return of

no property." *Behan v. Warfield*, 90 Ky. 151; and see further, as to waiver, *Hare v. Anderson*, 12 R. 303; *Brown v. Vancleave*, 14 R. 821; and see further, as to waiver by failure to take proper exception, notes to secs. 333, 335.

§ 757. (1) **Dismissal of appeal—partial judgment.** When an appeal is sought to be dismissed on the ground that it is barred by limitation, a written plea must be filed. The objection can not be made by motion. *Riley v. Reed*, 13 Bush 411.

(2) A motion to dismiss an appeal on the ground that appellant had compromised with appellee will not be entertained unless the plea is presented by a verified answer, as required in sec. 758. *Empire Co. v. McIntosh*, 82 Ky. 554.

(3) The fact that appellant had agreed to pay, and appellee to receive, a less sum than the judgment as a compromise in full satisfaction of the judgment appealed from can not be pleaded in the Court of Appeals to show that appellant had no right to prosecute the appeal. *Parks v. Doty*, 13 Bush 727.

(4) Accepting satisfaction of judgments bars right of appeal. See notes 1, 2, 3, sec. 734; but where party only recovers judgment for part of debt that he sues for he may enforce collection of that part and appeal as to part he failed to recover. *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633.

(5) Whenever any person occupying a fiducial relation resigns or is removed from office his right to prosecute an appeal terminates, and this fact may be brought to the notice of the court by an answer; so, when the right of a bankrupt passes to his assignee. *Parks v. Doty*, 13 Bush 727.

(6) When appellant dies after judgment

appellant's consent, before the day on which the case is set for trial on the docket, except upon five days' notice served upon the appellant or upon his attorney of record. [But when a party recovers judgment for only part of the demand or property he sues for, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for that he did not recover.] (*Sec. as amended by act 1880; words in brackets added by act 1888.*)

§ 758 [1888] **Pleading to show cause for dismissing appeal.** If the facts mentioned in section seven hundred and fifty-seven be not shown by the record, the appellee may plead them by a verified answer, to which the appellant may file a verified reply; and the questions of law or fact thereon shall be heard and determined by the court on or after the day on which the case is set for trial on the docket.

§ 759 [1888] **Appeal taken for delay—motion to affirm.** If an appeal with a supersedeas be taken for delay merely, the appellee may at any time move the court to affirm the judgment as a delay case; before making which motion, he or his counsel shall indorse on the record, in substance, that he has carefully examined the record and believes the appeal is prosecuted for delay merely; whereupon, the court shall examine the record, and if they find no error in the proceedings, and believe the appeal was prosecuted for delay merely, they shall affirm the judgment.

*See Rule 11
Court of Appeals*

§ 760 [1888] **Rules of court—mandate when to issue.** 1. The Court of Appeals may make rules for the convenient dispatch of business, the preser-

and before appeal, or pending the appeal, his death should be taken advantage of in the Court of Appeals by a plea under the provisions of sec. 758. When an appeal is prosecuted in the name of a dead person the judgment reversing the case is not void. *Spalding v. Wathen*, 7 Bush 659; and see further, note 11 to sec. 734.

(7) The Court of Appeals will take judicial notice of the law of a case as settled by the Supreme Court of United States. *Alexander v. Gish*, 13 R. 515.

(8) Notice of motion to dismiss appeal is necessary if motion is made without consent and before day case is set for hearing. *Empire Coal Co. v. McIntosh*, 5 R. 599.

(9) If an appeal is irregularly granted the proper remedy is by a motion to dismiss the appeal or discharge the supersedeas. *Schmidt v. Mitchell*, 95 Ky. 342.

(10) Where a party fails to recover amount he sues for he may enforce judgment he does obtain, and appeal from judgment against him as to balance of his claim, and if the appellee supersedes the collection of judgment obtained and prays a cross-appeal, upon the affirmance of cross-appeal damages will be awarded on amount of judgment superseded. *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633, and see further, as to damages in appeal notes, sec. 748.

§ 758. See notes 1-3, sec. 757.

§ 759. **Cross-appeal.** Motion to affirm cross-appeal as delay case will not be heard until original appeal is heard. *Cov. Transfer Co. v. Piel*, 9 R. 665.

§ 760. (1) **Defective record.** A rehearing will not be granted to enable the parties to perfect the transcript. *Yeager v.*

vation of order, the argument of cases or motions, and the manner and time of presenting motions or petitions for rehearing, therein; and the time for issuing its mandates and decisions, and the mode of enforcing its mandates and orders, and may change the same: *Provided*, That no mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered, unless the court, in delay cases, otherwise direct; and, if said thirty days expire during a vacation or recess of the court, a written order of one of its judges, filed in its clerk's office, within said thirty days, shall have the same effect to suspend the mandate, by allowing a petition for a rehearing to be filed, or by allowing time to file such petition, as if such order were made by the court. (*Power to enforce mandates, sec. 762.*)

2. The rules of said court in force when this Code takes effect, and consistent with its provisions, shall continue in force until changed by the court. (*Rules of court, page 593.*)

§ 761 [901] **Proceedings in lower court upon return of case.** 1. Upon the affirmance of, or the dismissal of an appeal from, a judgment for the payment of money or delivery of personal property, the appellee may file in the clerk's office of the inferior court a copy of the mandate of affirmance or order of dismissal—upon which the clerk shall indorse the time of its being filed; and, thereupon, such writs of execution may be issued as if the mandate or order had been entered in the court.

Groves, 78 Ky. 278; Christopher v. Searcy, 12 Bush 171; and see further, as to correction of record, after opinion has been delivered, notes 1, 2, sec. 742.

(2) Where it is suggested that the record is defective by reason of a clerical misprision, time will be given to have it corrected in the lower court. Williams v. Thompson, 80 Ky. 325.

(3) **Final termination of case** There is no final termination of a case in Court of Appeals until the time for filing petition for rehearing has expired, or until petition has been filed and overruled. Cline v. Wrightson, 7 R. 215.

(4) **Petition for rehearing.** "All extensions of time for presenting petitions for rehearing, unless otherwise expressed in the order, should be counted from the expiration of the thirty days allowed by law, and Sundays should be excluded from the extension of time granted by the court. Such motion, however, must be made while the party has the right

by law or the permission of the court to file a petition for a rehearing." L. & N. R. R. Co. v. Turner, 81 Ky. 599.

(5) **Powers of court.** See Constitution, sec. 110, and Ky. Stat., sec. 949; and notes to sec. 762.

(6) **Time mandate shall issue** as provided in this section applies only to civil cases; in criminal cases mandate may issue immediately. Nelson v. Com., 94 Ky. 594.

§ 761. (1) **Mandate.** "Wherever the record, as it stood at the time the decision was rendered, when considered in connection with the opinion when delivered, shows that the clerk has made a mistake in entering the mandate, this court has power, at any rate during the succeeding term, to correct the error." Wade v. First Nat. Bank, 11 Bush 697; and see Whitehead v. Boorum, 7 Bush 399; Finnell v. Jones, 7 Bush 359.

(2) The mandate must be considered with reference to the opinion preceding

2. If a judgment be reversed, and the case remanded for a trial, or other proceedings, it shall stand for trial, or for such other proceedings, in the court whence the appeal was taken, at the next succeeding term thereof: *Provided*, That the mandate of the Court of Appeals be filed in the clerk's office of the lower court, and notice thereof given to the adverse party, if he be in the county; or, if he be absent from the county, to his attorney, ten days before the commencement of such term. Such case shall have the same position on the docket of such court, as if no appeal had been taken; and, at any time after the mandate is filed and notice thereof given, as aforesaid, either party may take depositions, as in other cases.

it, and it must be entered before the chancellor has power to suspend the execution of the order directed by it, even for good cause. *Watson v. Avery*, 3 Bush 635.

(3) The judgment ordered by the mandate should be entered. The court has no discretion concerning it. *Scott v. Scott*, 9 Bush 174; *McLean v. Nixon*, 18 B. M. 768.

(4) The Court of Appeals has power by rule against an inferior court to enforce obedience to its mandate. *Watson v. Avery*, 3 Bush 635; *Smith v. Cochran*, 7 Bush 548; and see note to sec. 792.

(5) When a cause has been heard by the Court of Appeals and remanded to the circuit court with directions to render a particular decree or judgment, the cause is finally disposed of to that extent, and no pleadings can be filed in the circuit court which will have the effect of avoiding the mandate of the Court of Appeals, unless the pleadings are of such a character as would authorize a final decree or judgment to be reviewed or vacated after the expiration of the term at which it was rendered. *Denny v. Wickliffe*, 1 Met. 216; *McLean v. Nixon*, 18 B. M. 768; see *Woodcock v. Bowman*, 2 Duv. 508.

(6) **Proceedings in lower court.** When opinion and mandate are filed in open court no notice is required to be served on the adverse party in order to give case position it had on docket before appeal was taken, and the case stands ready for submission subject to an order of contin-

uance which the court may grant. *Baker v. Baker*, 87 Ky. 461; but in *Lloyd v. Matthews*, 92 Ky. 300, it is held that the above quotation from *Baker* case was *obiter*, and that where a case is reversed it does not stand for trial or other proceedings at the next succeeding term of lower court unless the mandate is filed in the clerk's office and notice given ten days before commencement of term; and this rule applies as well where the mandate directs a particular judgment to be entered as where case is remanded for trial or further preparation.

(7) **Restitution of property.** Money received under an erroneous judgment before its reversal may be restored to party entitled to receive it by rule of court or by action on the return of case. Defenses that arose after rendition of erroneous judgment may be presented against restitution, but defenses that might have been or were relied on prior to such judgment can not be. *Gray v. Patton*, 3 R. 393; and see *Hays v. Griffith*, 85 Ky. 375.

(8) Restitution of property sold under a judgment declared by Court of Appeals to be void; chancellor has power to order. *Brown v. Vancleave*, 14 R. 821; and see further, *Gregory v. Litsey*, 9 B. M. 44; *Dickerson v. Morgan*, 8 Dana 130.

(9) Ordinarily, where there is no supersedeas, the plaintiff, who recovers in his fiducial capacity and pays out the money before a reversal of the judgment, will not be personally liable. *Shultz v. Beatty*, 6 R. 662.

§ 762 (903) **Mandates—power of court to enforce.** The Court of Appeals may enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until the mandates are obeyed. (*Mandate when to issue, sec. 760.*)

§ 763 (903) **Judgments that court will not reverse.** Neither a void judgment, nor a judgment against a defendant who shall have been only constructively summoned, and shall not have appeared in the action; nor any judgment which can be set aside or modified by the court which rendered it, upon motion made after the term during which it was rendered, shall be reversed or modified by the Court of Appeals, until a motion to set aside or modify the judgment shall have been made in the inferior court and overruled. (*Judgments that inferior court may vacate or modify, secs. 414, 517, 518.*)

§ 764 (904) **Damages upon affirmance.** Upon the affirmance of, or the dismissal of an appeal from, a judgment for the payment of money, the collection of which, in whole or part, has been superseded, as provided in chapter two of this title, ten per cent damages on the amount superseded shall be awarded against the appellant.

§ 762. (1) **Enforcement of mandates.** The Court of Appeals can not undertake to dictate or control the manner in which the judgment of the lower court, when affirmed by it, is to be enforced, unless the court should absolutely refuse to enforce it; in such case mandamus might be issued by Court of Appeals, but where the lower court attempts to enforce the judgment rendered on appeal by a judgment, the remedy is by appeal. *Rohmeiser v. Bannon*, 15 R. 114; see further, notes 1-5, sec. 761.

(2) **Powers of court.** "This court has no power to determine the question of the liability of a sheriff for failing to make money on an execution issued from this court," but it has power to compel obedience to its process. *Marchand v. Russell*, 78 Ky. 517; see to the contrary, *Mitcheson v. Foster*, 3 Met. 325.

(3) As to its power to punish for contempt, see *In re Woolley*, 11 Bush 95.

§ 763. (1) **Clerical misprision.** The failure of the court to allow a credit of forty-one dollars is not misprision, but a reversible error. *Tong v. Eifort*, 80 Ky. 152. See further, as to misprision, secs. 516, 517 and notes thereto.

(2) **Non-resident.** It was held under the Code of 1854 that a non-resident might appeal for errors apparent in the record without attempting to have judgment corrected in lower court. See notes to sec. 414. That Code, sec. 903, provided that "a judgment or final order shall not be reversed for an error which can be corrected on motion in the inferior court, until such motion has been made there and overruled." Note difference between that section and this.

(3) **Void judgment—motion to set aside.** A motion to set aside a void judgment must be made and overruled in the lower court before an appeal lies to reverse it. *Bullitt v. Com.*, 14 Bush 74; *Easterling v. Chiles*, 93 Ky. 315; *Louisville R. & L. Co. v. Kerr*, 78 Ky. 12; *Curd v. Williams*, 13 R. 855; but a party may waive objection to the hearing of an appeal from a void judgment by failing to move to dismiss appeal, and in such case the opinion of Court of Appeals is binding. *Brown v. Vancleave*, 14 R. 821.

§ 764. (1) **Damages on affirmance.** See further, notes to sec. 748.

(2) The appellee is not entitled to damages against the appellant when the judg-

[And upon the affirmance of, or the dismissal of an appeal from, a judgment for money rendered against any insurance, railroad, corporation or company, or against any corporation not created by or organized under the laws of the Commonwealth of Kentucky, ten per centum damages on the amount of the judgment appealed from shall be awarded against the appellant, although such judgment be not superseded. (*Words in brackets added by act of 1888.*)

§ 765 ^[908] **Written opinions to be delivered.** The court must deliver written opinions in all cases.

§ 766 ^[909] **Reporter of court and duties.** The reporter of the decisions of the Court of Appeals shall make a brief statement of the facts involved in the decisions, unless they be stated in the opinion of the court, and a brief statement of the legal propositions of counsel on both sides, and a statement of the authorities cited by counsel in support of each proposition. (*See further as to reporter, Ky. Stat., sec. 956.*)

§ 767 ^[907] **Provisions concerning revivor applicable.** The provisions of title eleven shall, so far as applicable, regulate cases in the Court of Appeals.

[Sections seven hundred and sixty-eight to eight hundred and thirty-six inclusive, related to the Louisville Chancery Court and the Jefferson Court of Common Pleas, and being impliedly if not expressly repealed by the new Constitution and laws made in pursuance thereof are omitted, and in place thereof I have added the sections of the Ky. Stat. relating to courts having four judges and to courts having continuous sessions; these laws will be found on pages 563 and 557.]

ment of the lower court is affirmed on the original and reversed on the cross-appeal. *Wade v. First Nat. Bank*, 11 Bush 697.

(3) The claim for damages does not constitute a lien upon the property of the appellant. It is secured if at all by the sureties in the supersedeas bond. *N. & C. Bridge Co. v. Douglas*, 12 Bush 673.

(4) **Is amendment to this section un-**

constitutional? See opinion of superior court in *C., N. O. & T. R. R. v. Clark*, 11 R. 808.

(5) **Void appeal.** No damages. *American Accident Co. v. Reigart*, 92 Ky. 142; and see notes 17, 18, sec. 748.

§ 767. **Death of plaintiff in judgment.** Appeal—revivor. *Hopkins v. Hopkins*, 91 Ky. 310; *Spalding v. Wathen*, 7 Bush 659.

CONCLUDING PROVISIONS.

§ 837. Certain sections applicable to pending cases.

§ 838. Code regulates proceedings hereafter.

§ 839. Time of going into effect.

§ 837 [748, 762] **Certain sections applicable to pending cases.** The provisions of sections three hundred and thirty-three to three hundred and thirty-nine, both inclusive, of section six hundred and five, section six hundred and six, and of sections seven hundred and thirty-four to seven hundred and sixty-seven, both inclusive, shall regulate future proceedings in civil cases now pending; and, subject to those provisions, such cases shall be governed by laws heretofore in force.

§ 838 [748, 766, 878] **Code regulates proceedings hereafter.** The provisions of this Code shall regulate pleadings and practice in civil cases commenced hereafter in courts which now exist, or [which] may hereafter be created; and, as to such cases, laws within the purview of those provisions are repealed; and this repeal does not revive any law which may have been repealed by laws which are hereby repealed.

§ 839. **Time of going into effect.** This act shall take effect on the 1st day of January, 1877.

§ 837. **Construction of section.** See *Saunders v. Moore*, 14 Bush 97.

§ 838. **Repealing provisions.** In *Newman v. Ecton*, 14 R. 793, it is held that the Code did not repeal the provisions of the Gen. Stat. concerning the sale of contingent interests in real estate, but the provisions of Statute referred to are omitted from Ky. Stat., and also from editions of

Gen. Stat., edited by Bullitt & Feland, upon the idea that they were at least impliedly repealed by Code provisions, and see *Grigsby v. Barr*, 14 Bush 330, holding that where the Code provides a method of procedure it is to be taken as exclusive of all others. See further, notes to sec. 16, where are cited the other cases bearing on this question.

THE CODE OF PRACTICE
IN
CRIMINAL CASES.

THE CODE OF PRACTICE

IN

CRIMINAL CASES.

PRELIMINARY PROVISIONS.*

§ 1. Name of the act—regulates all prosecutions and penal actions.

§ 2. Proceedings commenced before January 1, 1877.

§ 3. Laws within purview of Code repealed—exception.

§ 1. **Name of act—regulates prosecutions and penal actions.** That the provisions of this act shall regulate the proceedings in all prosecutions and penal actions in all the courts of this Commonwealth, from and after the first day of January, 1877, and shall be known as “The Code of Practice in Criminal Cases.”

§ 2. **Proceedings commenced prior to January 1, 1877.** That all prosecutions or proceedings in criminal or penal cases, which shall be commenced before the first day of January, 1877, and which, by the existing laws, would be valid, shall not be rendered invalid by this act, but may be prosecuted to their conclusion, and enforced according to the existing laws, as if this act had not been passed.

§ 3. **Laws within purview of Code repealed — exception.** That all laws coming within the purview of this act shall become repealed when this act goes into effect, except as provided in the preceding section.

*(1) **Application of Criminal Code.** The Criminal Code was intended to provide a new and complete mode of procedure in all criminal and penal cases. It prescribes the form and manner in which indictments must be prepared and presented, and these regulations apply to all prosecutions, whether for felonies or misdemeanors. *Com. v. Patterson*, 2 Met. 374; and see further, as to application of Code, *Walston v. Com.*, 16 B. M. 15; *Com. v. Craig*, 15 B. M. 534.

(2) **Conflict between Statutes and Code.** In *Com. v. Watts*, 84 Ky. 537, the court say: “It was not intended that either the act adopting the Civil or the one adopting the Criminal Code should repeal the General Statutes as a whole or any part thereof, except such as in the language of the repealing sections of both comes within the *purview* of the acts respectively.”

(3) The words “coming within the purview” should be understood as repeal-

TITLE I.

PUBLIC OFFENSES AND THE MODES OF PREVENTING AND PROSECUTING THEM.

- § 4. Public offenses defined.
- § 5. Divided into felonies and misdemeanors.
- § 6. Felony defined.
- § 7. Misdemeanor defined.
- § 8. Arrest of persons charged with offense.
- § 9. Indictable offenses—offenses not indictable.
- § 10. Offenses prosecutable by warrant or summons.
- § 11. Offenses that may be prosecuted by penal action.
- § 12. Prevention of offenses.

§ 4 ^[1] **Public offense defined.** A public offense, in the meaning of this Code, is any act or omission for which the law has prescribed a punishment.

§ 5 ^[2] **Divided into felonies and misdemeanors.** Public offenses are felonies and misdemeanors. (*See same definition, Ky. Stat., sec. 1127.*)

§ 6 ^[3] **Felony defined.** A felony is an offense of which the punishment is death, or confinement in the penitentiary.

§ 7 ^[4] **Misdemeanor defined.** All other public offenses are misdemeanors.

§ 8 ^[5] **Arrest of persons charged with offense.** Persons charged with the commission of a public offense shall be liable to be immediately arrested and proceeded against in the manner hereinafter directed. (*By whom and how arrest made—proceedings upon, secs. 35 to 49.*)

ing all acts in relation to all cases which are provided for by the repealing act, and that the provisions of no act are thereby repealed in relation to cases not provided for by it. 84 Ky. 537.

(4) Where some of the provisions of the General Statutes upon a particular subject are within the purview of the Code and others are not, if to hold the former repealed and the latter not repealed leads to an absurdity, none of the provisions upon the subject is to be held repealed. 84 Ky. 537.

(5) **Construction of statutes.** In *Buchanon v. Com.*, 95 Ky. 334, the court held that the act of April 10, 1893—chapter 36, Ky. Stat., crimes and punishments—was intended to be a complete system of statutory law relating to crimes and punishments, and repealed all existing statutes on that subject.

(6) Sec. 459, Ky. Stat., declares that

“there shall be no distinction in the construction of statutes between criminal or civil and penal enactments. All statutes shall be construed with a view to carry out the intention of the Legislature.”

(7) **Provisions of Civil Code do not apply** to proceedings under Criminal Code unless it is so provided. The Civil Code, sec. 606, provides that no prisoner in the penitentiary shall testify, but the court held that this provision did not apply to criminal prosecutions, and that a prisoner might testify in a criminal case. *Com. v. Minor*, 89 Ky. 555; and see *Combs v. Com.*, 15 R. 600.

(8) **Repeal of statute does not affect** prosecution for or punishment of crimes committed before its repeal. *Ky. Stat.*, sec. 465; *Waddell v. Com.*, 84 Ky. 276. *Com. v. Sherman*, 85 Ky. 686; *Com. v. Duff*, 87 Ky. 586.

§ 9 (1) **Indictable offenses—offenses not indictable.** All public offenses may be prosecuted by indictment, except—

1. Offenses of public officers, where a different mode of procedure is prescribed by law.

2. Offenses exclusively within the jurisdiction of justices of the peace, or of police or city courts. (*Jurisdiction of Justices, page 550, Police Courts, page 551.*)

3. Offenses arising in the militia, of which a military court has exclusive jurisdiction. (*See Ky. Stat., secs. 2684–2687.*)

§ 10 (1) **Offenses prosecutable by warrant or summons.** Offenses within the jurisdiction of a justice of the peace, or of a city or police court, the punishment of which is a fine limited to one hundred dollars, may be prosecuted by a summons or warrant of arrest, in which shall be stated, in general terms, the offense charged to have been committed. (*Form of warrant, sec. 27; form of summons, page 652; prosecution by information, see Ky. Stat., sec. 1141.*)

§ 11 (1) **Offenses that may be prosecuted by penal action.** A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky, or in

§ 9. (1) **Contempt.** The court has the power to punish contempts in a summary way, and no indictment is necessary. *Arnold v. Com.*, 80 Ky. 300; and see *In re R. W. Woolley*, 11 Bush 95. See *city of Newport v. Newport Light Co.*, 92 Ky. 445, and note difference between criminal and civil contempt.

(2) **Jurisdiction of Justices and Police courts,** see page 550 of this Code. Justices of the peace and county judges have jurisdiction of the offense of carrying concealed a deadly weapon. *Smith v. Com.*, 3 R. 364.

(3) **Militia.** Jurisdiction of offenses concerning. *Ky. Stat., secs. 2684–2687.*

§ 11. (1) **Penal action.** The proceedings in penal actions are regulated by the Code of Practice in civil cases, and when the matter in controversy does not exceed fifty dollars the pleadings may be oral; section 705 Civil Code. *Wilson v. Com.*, 7 Bush 536.

(2) A person guilty of usurpation of office may be proceeded against by indictment or penal action; and the right of the Commonwealth to recover a fine in either of these modes is not affected

by sec. 483 of the Civil Code. *Com. v. Adams*, 3 Met. 7.

(3) A railroad company guilty of violating the Sabbath day may be prosecuted by penal action. *Com. v. L. & N. R. R.*, 80 Ky. 291.

(4) A civil action may be maintained to recover a fine or forfeiture. *Com. v. Sherman*, 85 Ky. 686; *Com. v. Avery*, 14 Bush 625.

(5) **Jurisdiction of courts.** See Civil Code, sec. 63; 85 Ky. 686.

(6) **Pleading—practice.** Action brought in name of *State of Kentucky* may be amended so as to read *Commonwealth of Kentucky*, and no summons is necessary on amendment. 85 Ky. 686.

(7) In a penal action for violating Sabbath day, it is sufficient to aver that acts complained of were done on the Sabbath day without stating day of the month. *L. & N. R. R. v. Com.*, 92 Ky. 114.

(8) In the absence of a motion for a new trial in penal actions, the only question that can be considered on appeal is the sufficiency of the pleadings to support the verdict and judgment. *L. & N. R. R. v. Com.*, 92 Ky. 114.

the name of an individual or corporation, if the whole fine be given to such individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions. (*Venue of action, Civil Code, sec. 63.*)

§ 12 ⁽⁹⁾ **Prevention of offenses.** The commission of public offenses may be prevented by proceedings—

1. For suppressing riots and resistance to lawful authority.
2. For requiring security to keep the peace, or for good behavior.
3. For arresting and confining insane, drunken and disorderly persons. (*Proceedings to suppress riots, sec. 371; to keep the peace, sec. 382; to arrest drunken persons, sec. 394.*)

TITLE II.

CRIMINAL JURISDICTION OF THE COURTS OF THE STATE.

- § 13. Jurisdiction of various courts.
- § 14. Indictment in circuit court—jurisdiction.
- § 15. Removal of prosecutions from circuit to inferior courts.
- § 16. Grand jury to state where misdemeanor committed.
- § 17. Jurisdiction of Senate and Court of Appeals.
- § 18. Local jurisdiction of circuit and justices' courts.
- § 19. Local jurisdiction of police or city courts.
- § 20. Jurisdiction on river between counties.
- § 21. Prosecution in either of several counties—libel.
- § 22. Importing property into State—jurisdiction.
- § 23. Kidnaping—jurisdiction of offense.
- § 24. Trial in county of arrest—exception.
- § 25. Writs of prohibition from circuit court.

§ 13 ⁽¹⁰⁾ **Jurisdiction of various courts.** The jurisdiction of the courts of this Commonwealth, for the trial of offenses, shall be as follows :

1. *Senate of Kentucky.* The Senate of Kentucky shall have exclusive jurisdiction of impeachments. (*Constitution, sec. 67.*)

2. *Court of Appeals.* The Court of Appeals of Kentucky shall have exclusive jurisdiction of proceedings for the removal of clerks of courts from office. (*Constitution, sec. 124.*)

§ 13. (1) **Jurisdiction.** Removal of clerks. See Constitution, sec. 124, and Com. v. Rodes, 1 Dana 595; Com. v. Arnold, 3 Litt. 309; Com. v. Rodes, 6 B. M. 171.

(2) Justices' and police courts—jurisdiction of. See pages 550, 551.

(3) In a prosecution for erecting a

fence across a public road, where the fine is one dollar for each day the fence is allowed to remain, the prosecution may be before a justice if the liability does not exceed ten dollars; if the liability is over that amount the prosecution may be by indictment in Circuit Court. Com. v. Mills, 6 Bush 296.

3. *Circuit courts.* The circuit courts shall have general jurisdiction for the trial of all prosecutions and penal actions, unless exclusive jurisdiction be given to other courts. (*Exclusive jurisdiction of justices' courts, see page 550 ; of police courts, page 551.*)

4. *City and police courts.* City and police courts shall have exclusive jurisdiction of all prosecutions and actions, for an infraction of the by-laws or ordinances of the city or town in which they are located, and concurrent jurisdiction with the circuit courts, and justices' courts, of prosecutions for misdemeanors committed in the town or city, the punishment of which is a fine not exceeding one hundred dollars, and, also, such jurisdiction as is, or may be, provided by the special statutes creating or regulating such courts. (*Jurisdiction of police courts page 551.*)

5. *Justices' courts.* Justices' courts shall have jurisdiction, concurrent with city or police courts, but exclusive of circuit courts (except of indictments in the circuit court against surveyors of public roads), of prosecutions for offenses the punishment of which is limited to a fine not exceeding ten dollars, and concurrent jurisdiction with the circuit courts in prosecutions for offenses the punishment of which is limited to a fine not exceeding one hundred dollars.

[Or imprisonment not exceeding fifty days, or both such fines and imprisonment; and in all cases of riots, routs, breaches of the peace, affrays and unlawful assemblies.

6. *Judges of county courts.* Judges of county courts shall have the same original criminal jurisdiction as justices' courts.] (*Words in brackets added by acts 1878.*)

§ 14 ^[11] **Indictment in circuit court—jurisdiction.** If an indictment be found in the circuit court for an offense within its jurisdiction, such court shall have jurisdiction in that prosecution of all the degrees of such offense, and of all offenses included in the one charged, although some of those degrees or included offenses are within the exclusive jurisdiction of an inferior or local court. (*What offenses included in one charged; degrees of offenses defined, secs. 262 to 266.*)

§ 15 ^[12] **Removal of prosecutions from circuit to inferior courts.** When prosecutions have been commenced in the circuit court, of which a city,

(4) A city court having jurisdiction where the punishment did not exceed five hundred dollars and imprisonment for one year had no jurisdiction of offenses the punishment of which might exceed that limit. *Flynn v. Com.*, 2 Bush 590.

§ 14. **Jurisdiction.** Where a city court was given exclusive jurisdiction of offenses under felony committed in city limits, the circuit court under the general law had jurisdiction to punish a person for a misdemeanor that was a

magistrates' or police court has concurrent jurisdiction, they may, by an order of the circuit court, be removed into such city, magistrates' or police court for trial. Upon such order being made, the clerk of the circuit court shall deliver to the clerk of the city, magistrates' or police court, all the papers relating to the prosecutions, and a copy of the order of removal, and thereupon the defendant shall be bound to appear in said police, magistrates' or city court, and the prosecution be carried on to final judgment and execution, as if commenced in such court. (*See as to jurisdiction of inferior courts, sec. 13; transfer of misdemeanors to county court, Ky. Stat., sec. 1076.*)

§ 16 ⁽¹³⁾ **Grand juries to state where misdemeanor committed.** The judges of circuit courts may require the grand juries, in prosecutions for misdemeanors within the local jurisdiction of city or police courts, to state in the indictments that such misdemeanors were committed within the town or city, or other local limits of the jurisdiction of the city or police courts.

§ 17 ⁽¹⁴⁾ **Jurisdiction of Senate and Court of Appeals.** The jurisdiction of the Senate and Court of Appeals embraces the whole Commonwealth.

§ 18 ⁽¹⁵⁾ **Local jurisdiction of circuit and justices' courts.** The local jurisdiction of circuit courts and justices' courts shall be of offenses committed within the respective counties in which they are held. (*See further, as to jurisdiction, sec. 13 and Ky. Stat., sec. 1143.*)

§ 19 ⁽¹⁶⁾ **Local jurisdiction of police or city courts.** The local jurisdiction of police or city courts shall be of offense, committed within the limits of the jurisdiction of such courts, as prescribed by the special statutes creating or regulating them. (*What are police courts, sec. 321. See further, as to such courts, sec. 306, and as to jurisdiction, page 551.*)

§ 20 ⁽¹⁷⁾ **Jurisdiction on river between counties.** If a river be the bound-

lower degree of the felony for which he was indicted. *Com. v. Pointer*, 5 Bush 301.

§ 18. (1) **Evidence—venue.** After the Commonwealth's attorney announced through with his evidence, the question was made that the venue of the offense had not been proven. The court should have permitted him to introduce evidence to show the venue. *Com. v. Patterson*, 10 R. 167.

(2) Where evidence was introduced showing that an offense was committed in the county seat town where trial was in progress, the court and jury had the right to presume that the town referred to was in county where case was being

tried, although no evidence of county was introduced. *Com. v. Patterson*, 10 R. 167; and in *Hays v. Com.*, 12 R. 611, it is held that where evidence is introduced showing commission of crime in a certain named precinct in county where trial is in progress, that a verdict of conviction will not be disturbed although there is no proof of county in which offense was committed.

(3) **Justices' courts—jurisdiction of.** See page 550.

§ 19. **Police courts—jurisdiction of.** See page 551.

§ 20. **Over Ohio river.** The boundary and jurisdiction of this State extend to

ary between two counties, the criminal jurisdiction of each county shall embrace offenses committed on the river, or on any island thereof. (*See further, Ky. Stat., sec. 1143.*)

§ 21 ^[18] **Prosecution in either of several counties—libel.** If an offense be committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the jurisdiction is in either county. [But all prosecutions against persons publishing a newspaper for any libelous matter contained therein shall be had in the county where the same is printed and issued, or in the county where the party complaining resides.] (*Words in brackets added by act 1886; and see further, Ky. Stat., sec. 1146.*)

§ 22 ^[19] **Importing property into State—jurisdiction.** If the offense consist of importing any property into the Commonwealth, the jurisdiction shall be in any county into which the property may be imported.

§ 23 ^[20] **Kidnaping — jurisdiction of offense.** If the offense consist of kidnaping, or seizing or confining a person without lawful authority, the jurisdiction shall be in the county in which the kidnaping, seizing or confining was committed, or in any county in which it was continued.

§ 24 ^[21] **Trial in county of arrest—exception.** If the jurisdiction of an offense be in two or more counties, the defendant shall be tried in the county in which he is first arrested, unless an indictment for the offense be pending in another county. (*See further, Ky. Stat., sec. 1145.*)

low-water mark on the western or north-western side of the Ohio river, and one who commits an offense on that river may be punished by the courts of this State. *McFall v. Com.*, 2 Met. 394. See *Ky. Stat.*, sec. 1144.

§ 21. (1) **Jurisdiction.** Receiving stolen property, knowing it to be stolen, is a complete offense, and the circuit court of the county in which the property is received, and not of the county in which the larceny is committed, has jurisdiction of the offense. *Allison v. Com.*, 83 Ky. 254.

(2) A thief can be indicted for a complete larceny either in the county where he first took the property, or in any county into which, the intent to steal continuing, he carries it. *Thomas v. Com.*, 12 R. 903; 83 Ky. 254; and see *Massie v. Com.*, 90 Ky. 485.

(3) When the principal crime is com-

mitted in one county and the accessorial acts are done in another, the accessory must be indicted in the county in which the accessorial acts are done. *Tully v. Com.*, 13 Bush 142.

(4) Where false pretenses are made in Ohio and the money or property obtained in this State, the indictment should be found in county of latter, where money or property was obtained. *Com. v. Van Tuyl*, 1 Met. 1.

§ 22. **Importing property.** Where a horse was stolen in Tennessee and brought into this State and sold, the thief could be prosecuted in the county in which he disposed of the property. *Ferrill v. Com.*, 1 Duv. 153.

§ 24. **Jurisdiction.** Where a horse was stolen in M county and taken to B county and the thief there arrested and carried back to and tried in M county, the conviction in latter county was

§ 25 [22] Writs of prohibition from circuit courts. The circuit court of any county may, by writ of prohibition, restrain all other courts of inferior jurisdiction in the limits of the county from exceeding their criminal jurisdiction. (*How writ obtained and prosecuted, see Civil Code, sec. 474.*)

[Ky. Stat., § 1073.] **Persons in jail charged with misdemeanors—notice.** When any person charged with a misdemeanor shall be lodged in jail in default of bail, it shall be the duty of the jailer to at once notify the county judge and county attorney of the fact, if the court in which the prisoner has been indicted, or before which he has been ordered to appear, is not in session.

[Ky. Stat., § 1074.] **Trial of persons in jail charged with misdemeanors.** The judge shall thereupon direct the clerk of the circuit court to deliver to him a certified copy of the record in his possession, by virtue of which the prisoner was arrested and is detained, and shall, upon receiving such record, order the prisoner to be brought before him at the court-house, and give notice of the fact to the county attorney, who shall prosecute. He shall give the accused notice of the charge against him, and proceed at once to try the case, or fix a day for its trial, and issue summons for such witnesses as may be needed by either party. If the prisoner has no attorney, and is too poor to employ one, the court shall, at his request, appoint an attorney to defend him.

[Ky. Stat., § 1075.] **Proceedings after judgment.** The trial and proceedings after judgments shall be in all respects the same as if the case was tried in the circuit court.

[Ky. Stat., § 1076.] **Transfer of misdemeanor cases by circuit court.** If at the end of any term of a circuit court, there shall be persons in jail under indictment for misdemeanor, the court shall make an order transferring all such indictments to the county court, and the circuit clerk shall immediately upon the adjournment furnish a copy of the record in such cases to the county judge, who shall proceed to try such persons as hereinbefore provided.

[Ky. Stat., § 1077.] **Appeals in misdemeanor cases.** An appeal may be taken from the judgment of the county judge in misdemeanor cases, as provided in the Criminal Code in appeals in misdemeanor cases.

proper. The object of this section is to prevent a conflict of jurisdiction where it belongs to more than one county, and if the thief had been arrested by the B

county officials for the purpose of being tried in that county, the M county court would not have had jurisdiction. *Masale v. Com.*, 90 Ky. 485.

TITLE III.

PROCEEDINGS FOR THE ARREST OF CRIMINALS.

CHAPTER I. WARRANT OF ARREST, 26.

II. ARREST, BY WHOM AND HOW MADE, 35.

CHAPTER I.

WARRANT OF ARREST.

- § 26. Warrants, issual and execution—magistrates and peace officers.
- § 27. Warrant, requisites and form of.
- § 28. Persons arrested for misdemeanor may give bail—sheriff may take.
- § 29. Officer taking bail to fix day for appearance.
- § 30. Deviation from last section will not invalidate bond.
- § 31. Warrant, when magistrate shall issue—penalty.
- § 32. Examination of witnesses to ascertain offender.
- § 33. Return on warrant—what it shall state.
- § 34. Officer may transmit warrant by mail—when.

§ 26 ⁽¹³⁾ **Warrants, issual and execution—magistrates and peace officers.** A warrant of arrest may be issued by the following officers, who are called magistrates in this Code, viz.: judges of the county courts, judges of city or police courts, mayors, chairmen of the trustees of towns and justices of the peace; and may be executed by the following officers, who are called peace officers in this Code, viz.: sheriffs, constables, coroners, jailers, marshals and policemen.

§ 27 ⁽¹⁴⁾ **Warrant, requisites and form of.** A warrant of arrest shall, in general terms, name or describe the offense charged to have been committed, state the county in which it was committed, and command the officer to whom it is directed to arrest the person named therein as the offender, and bring him before some magistrate of the county in which the offense was committed, to be dealt with according to law. It may be substantially in the following form, varying the terms to suit the case:

The Commonwealth of Kentucky to any sheriff, constable, coroner, jailer, marshal or policeman, of the State of Kentucky:

It appearing that there are reasonable grounds for believing that A B has committed the offense of larceny in the county of Frank-

§ 27. **Information.** The same technical strictness is not required in a proceeding by information that is required in an indictment. *Driscoll v. Com.*, 93 Ky. 893.

lin, you are therefore commanded forthwith to arrest A B, and bring him before some magistrate of Franklin county, to be dealt with according to law.

— — — — —, justice of the peace for Franklin county.

Summon as witnesses E F and J K. (*See act at end of sec. 71.*)

§ 28 ^[35] **Persons arrested for misdemeanor may give bail—sheriff may take.** If the offense charged be a misdemeanor, the person arrested may immediately give bail for appearing on a day to be named in the bail-bond, either before the magistrate who issued the warrant or the judge of the county court, for an examination of the charge, or before the court having jurisdiction to try the offense; and an indorsement to that effect, stating the amount of the bail to be given, and that the bail may be taken by the sheriff of the county where the arrest is made or where the offense was committed [or by any constable making the arrest] shall be made on the warrant of arrest, and such indorsement shall authorize the sheriff, or his deputy [or any such constable] to take the bail. (*Words in brackets inserted by act 1890. Form of bond, page 656; form of indorsement, page 653. Bail may be sworn; qualifications of, secs. 76, 77. Sheriff may take bail, sec. 83.*)

§ 29 ^[36] **Officer taking bail to fix day for appearance.** If the defendant give bail for his appearance before the magistrate for an examination of the charge, as provided in the last section, the officer taking the bail shall fix the day of the defendant's appearance, which shall not exceed five days from the day of arrest, unless the arrest be made in a different county from that in which the offense was committed, in which case there may be one day added for every twenty miles of distance of the place of arrest from the county in which the offense is charged to have been committed.

§ 30 ^[37] **Deviation from last section will not invalidate.** A deviation from the provisions of the last section shall not, however, render the bail bond invalid.

§ 31 ^[38] **Warrant—when magistrate shall issue — penalty.** A magistrate shall issue a warrant for the arrest of a person charged with the commission of a public offense, when, from his personal knowledge, or from information given to him on oath, he shall be satisfied that

§ 28. (1) **Bail—Sunday.** A bail bond executed or recognizance taken on Sunday is binding. *Rice v. Com.*, 3 Bush 14; *Watts v. Com.*, 5 Bush 309.

(2) **Sunday.** Examining trial may be

held on, and defendant admitted to bail. 5 Bush 309.

§ 31. **Warrant—Sunday.** Warrant of arrest may be issued and executed on Sunday. *Ky. Stat.*, sec. 4567; *Rice v.*

there are reasonable grounds for believing the charge. (*Penalty for magistrate issuing felony warrant except upon his own knowledge until affidavit filed, Ky. Stat., sec. 1372.*)

§ 32 ^[30] **Examination of witnesses to ascertain offender.** A magistrate, if satisfied that a felony has been committed, shall have power to summon before him any person he may think proper for examination on oath concerning it, to enable him to ascertain the offender and to issue a warrant for his arrest. [A magistrate, if satisfied that any public offense has been committed, shall have power to summon before him any person he may think proper for examination on oath concerning it, to enable him to ascertain the offender, and to issue a warrant for his arrest.] (*Words in brackets added by act 1884.*)

§ 33 ^[30] **Return on warrant—what it shall state.** The officer who has executed a warrant of arrest shall make a written return on the warrant of the time and manner of executing it, and deliver the warrant to the magistrate before whom the defendant is brought; or, if bail be given, as provided in section twenty-eight, the officer shall deliver the warrant and bail bond to the magistrate before whom, or to the clerk of the court in which, the defendant is bound by the bail bond to appear.

§ 34 ^[31] **Officer may transmit warrant by mail—when.** If the arrest be made in a different county from that in which the offense is charged to have been committed, and bail be there given, the officer may transmit the warrant and bail bond by mail to the person to whom, by the last section, he is required to deliver them.

Com., 3 Bush 14; Watts v. Com., 5 Bush 309.

§ 32. **Construction of section.** Under this section a magistrate has no power to ad-

minister an oath, nor can a person be legally sworn unless the matter concerning which the examination is had be a public offense. Kerfoot v. Com., 89 Ky. 174.

CHAPTER II.

ARREST, BY WHOM AND HOW MADE.

- § 35. Who may make arrest.
- § 36. Peace officer may arrest—when.
- § 37. Private person may arrest—when.
- § 38. Magistrate or judge may orally order arrest.
- § 39. Person to be informed of intention to arrest and cause of.
- § 40. Door may be broken to arrest.
- § 41. Officer may summon aid—penalty.
- § 42. Arrest—how made.
- § 43. Unnecessary force not to be used.
- § 44. Prisoner escaping may be pursued and recaptured.
- § 45. Officer arresting under warrant—how to proceed.
- § 46. Proceedings if arrest made without warrant—bail.
- § 47. Bond taken under last section sent by mail.
- § 48. Examination of charge by magistrate.

§ 35 ⁽³¹⁾ **Who may arrest.** An arrest may be made by a peace officer or by a private person.

§ 36 ⁽³²⁾ **Peace officer may arrest—when.** A peace officer may make an arrest—

1. In obedience to a warrant of arrest delivered to him.

§ 36. (1) **Arrest—appointment of special bailiff.** "There is no provision of the Code authorizing any other person than a peace officer to make an arrest in obedience to a warrant of arrest." The sheriff can not authorize a private person to execute a warrant of arrest. *Salisbury v. Com.*, 79 Ky. 425; as to the law concerning the murder of an officer while attempting to make an arrest, see *Mockabee v. Com.*, 78 Ky., 380; *Fleetwood v. Com.*, 80 Ky. 1; *Creighton v. Com.*, 84 Ky. 103; *Creighton v. Com.*, 83 Ky. 142; *Dilger v. Com.*, 88 Ky. 550.

(2) In *York v. Com.*, 82 Ky. 360, the court held that a sheriff had a right by an indorsement on a bench warrant to authorize a private person to arrest the defendant, but such person had no right to go out of county to make arrest.

(3) **Peace officer—arrest.** A peace officer can only make an arrest without a warrant "when a public offense is committed in his presence, or when he has

reasonable grounds for believing that the person arrested has committed a felony." *Wright v. Com.*, 85 Ky. 123; *Bates v. Com.*, 13 R. 132; and this provision applies to policemen in the city of Louisville. *Jamison v. Gaernett*, 10 Bush 221.

(4) When a public offense is committed within the hearing of a peace officer, and when he is so near that he can not be mistaken as to the offender, it is committed within his presence in the meaning of this section, and he may arrest without a warrant. *Dilger v. Com.*, 88 Ky. 550.

(5) It is the duty of a peace officer to arrest any drunken person who is at large and not in the care of some discreet person, and it is not necessary that he should be so drunk as to be annoying to others. *Wing v. Com.*, 7 R. 216.

(6) One who is not a peace officer, *de jure* or *de facto* does not, by assuming to exercise the duties of such an officer, acquire any more authority to make an

2. Without a warrant, when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony.

[3. That such peace officer with a warrant of arrest, when in the actual pursuit of an offender, may cross a county line for the purpose of making the arrest in the adjoining county.] (*Words in brackets added by act 1890. See further, as to arrest by peace officer without warrant, secs. 46, 383, 394, 395; who are peace officers, sec. 26.*)

§ 37 ⁽³⁴⁾ **Private person may arrest—when.** A private person may make an arrest, when he has reasonable grounds for believing that the person arrested has committed a felony.

§ 38 ⁽³⁵⁾ **Magistrate or judge may orally order arrest.** A magistrate or any judge may orally order a peace officer or private person to arrest any one committing a public offense in the magistrate's or judge's presence, which order shall authorize the arrest. (*See further as to oral direction to arrest, sec. 383.*)

§ 39 ⁽³⁶⁾ **Person to be informed of intention to arrest and cause of.** The person making the arrest shall inform the person about to be arrested of the intention to arrest him, and of the offense charged against him for which he is to be arrested, and if acting under a warrant of arrest, shall give information thereof, and if required, shall show the warrant. (*Sheriff may take bail, secs. 28, 83.*)

§ 40 ⁽³⁷⁾ **Door may be broken to arrest.** To make an arrest, an officer may break open the door of a house in which the defendant may be,

arrest than a private person. *Creighton v. Com.*, 83 Ky. 142.

(7) A person who has been elected to an office—town marshal—but who fails to qualify or attempt to qualify, is not a peace officer. 83 Ky. 142.

§ 37. **Private person—arrest.** The only cases in which a person not a peace officer can make an arrest are where he has reasonable grounds to believe that the person arrested has committed a felony, or, under section 38, where he is ordered by a magistrate or judge to arrest a person committing an offense in his presence. *Wright v. Com.*, 85 Ky. 123; *Bates v. Com.*, 13 R. 132; and see notes 1, 2 to sec. 36.

§ 39. (1) **Manner of arrest.** An arrest made in substantial compliance with the terms of this section is a legal arrest, but to make, or attempt to make, an arrest in disregard or violation of this section

is an illegal act which the person about to be arrested is not required to submit to. *Wright v. Com.*, 85 Ky. 123; *Hamlin v. Com.*, 11 R. 348.

(2) If there be reasonable opportunity, the person attempting to make the arrest must inform the party about to be arrested of his intention, of the offense charged and, if acting under a warrant, must say so, and, if demanded, show it. *Bates v. Com.*, 13 R. 132.

(3) When a person knows that he is about to be arrested and the offense charged against him, it is not necessary that the person making the arrest should give him the information required by this section. *Bowling v. Com.*, 7 R. 821.

§ 40. **Breaking door to arrest.** The sheriff, in order to make an arrest, has the right to break the outer or inner doors, but he can not break the house of a third person to arrest a criminal who

after having demanded admittance and explained the purpose for which admittance is desired. (*See further, as to powers of officer, Ky. Stat., sec. 4583.*)

§ 41 ^[38] **Officer may summon aid—penalty.** An officer making an arrest may orally summon as many persons as he deems necessary to aid in making the arrest, and all persons failing, without reasonable excuse, to obey the summons, shall be guilty of a misdemeanor, and be punished by fine and imprisonment, or either. (*Penalty for refusing to aid officer, Ky. Stat., sec. 1340.*)

§ 42 ^[39] **Arrest—how made.** An arrest is made by placing the person of the defendant in restraint, or by his submitting to the custody of the person making the arrest.

§ 43 ^[40] **Unnecessary force not to be used.** No unnecessary force or violence shall be used in making the arrest.

§ 44 ^[41] **Prisoner escaping may be pursued and recaptured.** If the defendant, after an arrest, escape or be rescued, the person in whose custody he was may immediately pursue and recapture him in any part of the Commonwealth.

§ 45 ^[42] **Officer arresting under warrant—how to proceed.** The officer making the arrest in obedience to a warrant shall proceed with the defendant as directed by the warrant. (*Sheriff may take bail, secs. 28, 83.*)

§ 46 ^[43] **Proceedings if arrest made without warrant—bail.** If an arrest be

does not dwell in that house unless the person to be arrested be actually in the house at the time of the entrance. *Hawkins v. Com.*, 14 B. M. 395; *Ky. Stat.*, sec. 4583

§ 41. **Persons not summoned** have no right to aid an officer in making an arrest. *Hamlin v. Com.*, 11 R. 348; as to right of person to resist arrest by an officer accompanied by a *posse* when he believes that the attempt to arrest is a mere pretext to do him harm, see *Minniard v. Com.*, 87 Ky. 213; *Bowling v. Com.*, 7 R. 821; and no person but an officer making an arrest can summon persons to aid in it. *Salisbury v. Com.*, 79 Ky. 425.

§ 43. (1) **Force officer may use.** Where an officer is attempting to make an arrest for felony he may use such force as is necessary to capture the felon, even to killing him when in flight; but where it is a misdemeanor the officer can not kill the offender unless he is resisting to such an

extent as to place the officer in danger of loss of life or great bodily harm. *Dilger v. Com.*, 88 Ky. 550.

(2) The above rule applies when an officer is attempting to arrest a felon who has escaped, but in misdemeanor cases when the offender is not resisting, but fleeing, the officer has no right to kill or shoot and wound. *Head v. Martin*, 85 Ky. 490; *Doolin v. Com.*, 15 R. 408.

(3) The provision that "no unnecessary force or violence shall be used" necessarily means that no more force shall be used than "reasonably appears" to the person making the arrest to be necessary. *Bowling v. Com.*, 7 R. 821; *Hamlin v. Com.*, 11 R. 348.

§ 46. **Magistrate has no authority to take a bail bond** from a prisoner brought before him for examination of a charge of felony committed in another county, nor has he any right to take temporary bail for the appearance of the accused before him. *Com. v. Salyer*, 8 Bush 461.

made without a warrant, whether by a peace officer or private person, the defendant shall be forthwith carried before the most convenient magistrate of the county in which the arrest is made, and the grounds on which the arrest was made shall be stated to the magistrate; and if the offense for which the arrest was made be charged to have been committed in a different county from that in which the arrest was made, and the magistrate believe, from the statements made to him on oath, that there are sufficient grounds for an examination, he shall, by his written order, commit the defendant to a peace officer, to be conveyed by him before a magistrate of the county in which the offense is charged to have been committed; or, if the offense be a misdemeanor, the defendant may give bail before the magistrate for his appearance before the judge of the county court of the county in which the offense was committed, on a day to be named in the bail bond, or for his appearance before the court having jurisdiction to try the offense, on a day to be fixed by the magistrate. (*Form of bond, page 656.*)

§ 47 (44) **Bond taken under last section sent by mail.** The magistrate taking bail, as provided in the last section, shall transmit by mail the bail bond to the officer before whom, or to the clerk of the court in which, the defendant is bound to appear.

§ 48 (45) **Examination of charge by magistrate.** If the arrest be made in the county in which the offense is charged to have been committed, the magistrate before whom the defendant is carried shall forthwith proceed to an examination of the charge, as provided in title four, or to a trial, as provided in titles seven and eight. (*See act at end of sec. 71.*)

TITLE IV.

PROCEEDINGS IN THE EXAMINING COURT.

- § 49. Magistrate to examine charge—judgment.
- § 50. Examination into charge forthwith.
- § 51. Duty of magistrate—notice to county attorney.
- § 52. Defendant may object to the magistrate.
- § 53. Proceedings when objection to magistrate made.
- § 54. Adjournment of examination not exceeding two days.
- § 55. Disposition of defendant during adjournment.
- § 56. Directions concerning money deposited as bail.
- § 57. Peace officer liable for money deposited.
- § 58. Forfeiture of bail during examination—proceedings.
- § 59. Extension of time for defendant's appearance.
- § 60. Amount to be deposited in lieu of bail.
- § 61. Witnesses—attendance how secured.
- § 62. Witnesses may be separated.
- § 63. Spectators may be excluded.
- § 64. Substance of testimony to be reduced to writing.
- § 65. Defendant to be discharged if charge not proven.
- § 66. Defendant guilty of any offense to be held over.
- § 67. Order of commitment to state amount of bail.
- § 68. Who may take bail after commitment.
- § 69. Magistrate to recognize witnesses to appear.
- § 70. Magistrate to return papers to clerk of trial court.
- § 71. Examining trial—who may hold—practice.

§ 49 ⁽⁴⁶⁾ **Magistrate to examine charge—judgment.** A magistrate of the county in which a public offense has been committed is authorized to examine the charge, and commit to jail or hold to bail the person charged with its commission, except as provided in section seventy-one. (*See act at end of sec. 71. Bail may be sworn; qualifications of, secs. 76, 77.*)

§ 50 ⁽⁴⁷⁾ **Examination into charge forthwith.** When a person who has been arrested shall be brought, or, in pursuance of a bail bond, shall

§ 49. (1) **Magistrates—power of.** Judges of county or police or city courts, mayors, chairman of the trustees of towns and justices of the peace are magistrates (sec. 26), and any one of them may commit or hold to bail except as provided in sec. 71; see amendment to that section. *Com. v. Cummings*, 18 B. M. 26; *Rice v. Com.*, 3 Bush 14.

(2) **Recognizance.** Bail may be taken by recognizance entered into before ex-

amining court. *Roberts v. Com.*, 7 Bush 430.

(3) **Sunday—bail.** A bail bond or recognizance executed on Sunday before an officer authorized to take the same is legal and binding on the defendant and his sureties. *Rice v. Com.*, 3 Bush 14; *Watts v. Com.*, 5 Bush 309.

(4) **Sunday—examining trial** may be held on and defendant admitted to bail. *Watts v. Com.*, 5 Bush 309.

come, before a magistrate of the county in which the offense is charged to have been committed, the charge shall be forthwith examined as directed in this title.

§ 51 ⁽⁴⁷⁾ **Duty of magistrate—notice to county attorney.** The magistrate, before commencing the examination, shall state the charge, and inquire of the defendant whether he desires the aid of counsel, and shall allow a reasonable opportunity for procuring it. He shall also, if the offense charged be a felony, give to the county attorney, if not present, reasonable notice in writing, of not more than one day, to attend and prosecute such charge. The notice may be served by any sheriff, constable or marshal, and it shall be the duty of such officer to serve the same when placed in his hands. (*Felony defined, sec. 6. County attorney to be notified in all cases, Ky. Stat., sec. 128.*)

§ 52. **Defendant may object to the magistrate.** If a defendant shall make and present his affidavit that he does not believe that he can secure a fair trial and examination, before the judge, officer or justices constituting the court, he or they shall retire from the case, and another or other magistrates shall take his or their places; but where only one of the two justices is objected to, he only shall retire from the case, and another justice shall take his place. When a judge or justice has retired from the case, by reason of the filing of the affidavit as provided above, and his place has been supplied by another judge or justice, no affidavit can be filed nor objection made, by the party first objecting, to parties then constituting the court.

§ 53. **Proceedings when objection to magistrate is made.** When the affidavit provided for in section fifty-two is filed, and there is but one magistrate; or if there be two and the objection apply to both; if the defendant be in custody, the peace officer, having him in custody, shall take him before some other magistrate to be examined. If the defendant be on bail, the examination shall be continued, and the peace officer in attendance shall notify another magistrate to attend and preside in the case. If the examination be before two justices of the peace, and the objection apply to but one of them, the other shall associate another justice with himself and proceed as directed in section seventy-one.

§ 54 ⁽⁴⁸⁾ **Adjournment of examination not exceeding two days.** For the purpose of procuring the attendance of witnesses, or for other sufficient reasons, the magistrate may adjourn the examination from time to time, not, however, exceeding two days at a time. (*See further as to extension of time, sec. 59.*)

§ 55 ⁽⁴⁰⁾ **Disposition of defendant during adjournment.** During the periods of adjournment the defendant may give bail when the offense with which he is charged is a bailable one. The court may, in bailable cases, fix a sum equivalent to bail, and if the defendant, or any one for him, deposit money to the amount named with the magistrate in attendance, unless he be a policeman, as security for the defendant's appearance at the time or times appointed, he shall be released from custody during the periods of the adjournment of the examination; but if the defendant fail to give bail, or to deposit money as indicated herein, or if the offense is not a bailable one, he shall, during such adjournment, be confined in the county jail: *Provided*, That said defendant may be committed to the custody of an officer if he will pay the expense of being guarded. (*Sec. as amended by act 1882. Form of bail bond, page 657; form of order of commitment, page 661.*)

§ 56 ⁽⁵⁰⁾ **Directions concerning money deposited as bail.** The magistrate shall make an entry, on the minutes of the examination, of the deposit and by whom made; and, if the defendant appear at the times appointed for his appearance, or at such other times to which the magistrate may extend the time for his appearance, or die during an adjournment, the money shall be returned by the peace officer to the person depositing it, or his representatives; but if the defendant fail to appear, the peace officer shall, within ten days after such failure, pay over the money to the trustee of the jury fund of the county. (*Form of entry concerning money deposited, page 658. If defendant surrendered, or grand jury fail to indict, money to be returned, secs. 88, 115.*)

§ 57 ⁽⁵¹⁾ **Peace officer responsible for money deposited.** The peace officer shall be responsible on his official bond for the money deposited as provided in the last two sections.

§ 58 ⁽⁵⁵⁾ **Forfeiture of bail during examination—proceedings.** If the defend-

§ 55. (1) **Bail during adjournment.** It was held in *Com. v. Moore*, 3 Met. 477, that a bail bond taken during the progress of the examining trial, where the defendant was charged with a felony, was unauthorized and void. But see now section as amended permitting bail.

(2) **Bail—who may take.** The charter of the city of Lexington provides that "as to committing criminal offenders and sending them on for trial, said court (city court) shall have the powers of two justices of the peace," but a bail bond taken by the clerk of said court was held void. *Dugan v. Com.*, 6 Bush 305.

(3) **Deposit of money in lieu of bail.** See further, sec. 89 and notes.

§ 58. (1) **Requisites of bond taken by magistrate.** It is necessary to the validity of a bond that some judgment should be entered or memoranda made in writing, signed by the justice showing that an examining court was held and that the accused was admitted to bail. *Morgan v. Com.*, 12 Bush 84.

(2) **Return of papers to circuit court** is necessary before the bond is forfeited; it is too late to file them after forfeiture of bond. 12 Bush 84.

ant give bail for his appearance during the examination, according to section fifty-five, and fail to appear at the time specified, or at the time extended, according to section fifty-nine, the magistrate shall indorse on the bail bond the word "forfeited," with his signature thereto, and return the bond to the clerk of the circuit court of the county, who shall proceed thereon as directed in section ninety-four, and such indorsement shall be sufficient evidence of the forfeiture of the bond.

§ 59 [52] **Extension of time for defendant's appearance.** When a deposit of money has been made, or bail given, the magistrate may, for sufficient cause, extend the time for the appearance of the defendant, not exceeding, however, ten days.

§ 60 [53] **Amount to be deposited in lieu of bail.** The sum of money to be deposited, as provided in the preceding sections, shall not be less than the full amount in which bail would be required, upon the defendant's being held for trial of the charge.

§ 61 [54] **Witnesses' attendance, how secured.** The magistrate shall, when requested to do so, issue subpoenas for witnesses, which shall be executed by a peace officer, and shall coerce their attendance by the same process as in the circuit courts. (*Form of subpoena, page 654; attachment, page 655. See also, as to attendance of witnesses, sec. 151.*)

§ 62 [55] **Witnesses may be separated.** During the examination the magistrate may cause the witnesses to be kept out of hearing of the witness testifying, and also separate from each other; and he shall do so upon the request of the prosecuting attorney, or of the defendant.

§ 63 [56] **Spectators may be excluded.** Upon the request of the defendant, all persons may be excluded from the room in which the examination is made, except the magistrate, his clerk, the peace officer, the prosecutor, the attorney or attorneys representing the Commonwealth, the prisoner, his counsel and the witness under examination. (*Exclusion of infants during certain trials, Ky. Stat., sec. 979.*)

§ 64 [57] **Substance of testimony to be reduced to writing.** The magistrate in the minutes of the examination shall state the name and place of residence of each witness examined, and the substance of his testimony. But such statement shall not of itself be evidence for any purpose. (*Form for minutes of examining trial, page 660.*)

§ 65 [58] **Defendant to be discharged if charge not proven.** When the examination is closed, if the magistrate be of opinion that there is not sufficient cause for believing that the defendant has committed a public offense, he shall discharge the defendant from custody, and make an entry thereof on the minutes.

§ 66 ^[50] **Defendant guilty of any offense to be held over.** If, however, the magistrate be of opinion, from the examination, that there are reasonable grounds to believe the defendant guilty of the offense charged, he shall be held for trial, and committed to jail, or discharged on bail, if the offense be bailable: *Provided, however,* That if, upon the trial, it shall appear that the defendant is guilty of a public offense, other than that charged in the warrant, he shall be held in custody of the officer and tried for such offense, a reasonable opportunity having been given him to obtain his witnesses and prepare his defense.

§ 67 ^[60] **Order of commitment to state amount of bail.** If the defendant be committed to jail, the magistrate shall make out a written order of commitment, signed by him, which shall be delivered to the jailer by the peace officer who executes the order of commitment. If the offense be bailable, the magistrate must fix the sum for which bail is to be given, and if sufficient bail be offered, take the same and discharge the defendant. If, however, sufficient bail be not offered, the sum in which bail is required must be stated in the order of commitment. (*Form of order of commitment, page 661.*)

§ 68 ^[62] **Who may take bail after commitment.** The defendant, after commitment, and before the commencement of the next term of the court having jurisdiction to try the offense, may be admitted to bail, in the sum fixed by the committing magistrate, by such committing magistrate or by the judge of the county court; but, after the commencement of the term of the court, can only be admitted to bail by the court or the judge thereof. After the term, if the amount of the bail have been fixed, the bail may be taken by the clerk of the court in which the defendant is held to appear. (*Form of bond, page 657; bail may be sworn, qualifications of, secs. 76, 77; application for, how made, sec. 81.*)

§ 69 ^[63, 64] **Witnesses recognized to appear.** On holding the defendant to answer the charge, the magistrate shall cause each of the material

§ 67. **Requisites of bond taken by magistrate.** See notes to sec. 58.

§ 68. (1) **Bail after commitment.** After the commencement of the term of the circuit court, the committing magistrate or county judge has no authority to admit the defendant to bail; if the bail is fixed the clerk of the court may take it. A bail bond executed before an officer not authorized by law to take it is not obligatory on the bail. *Branham v. Com.*, 2 Bush 3.

(2) The clerk has no authority to take bail when the amount has not been fixed by the court. *Wallenweber v. Com.*, 3 Bush 68.

(3) The defendant, having been indicted for murder and confined in jail without any order as to bail being made, sued out a writ of *habeas corpus*, and was admitted to bail by the two justices who heard the application (sec. 423); failing to appear the sureties in the bond were held liable. *Creekmore v. Com.*, 5 Bush

witnesses on behalf of the Commonwealth, and, at the defendant's request, each of such of the witnesses for him as he may suggest, to enter into a recognizance before him, to the effect that he will attend and testify in the court to which the defendant is sent for trial, or forfeit a sum, not less than one hundred dollars, to the Commonwealth of Kentucky. If witnesses for the defendant be recognized, it shall be stated in the recognizance that they are such. (*Form of recognizance, page 656.*)

§ 70 ^[63] **Magistrate to return papers to clerk of trial court.** The magistrate shall within ten days, and before the commencement of the next term of the court to which the defendant is sent for trial, deliver to the clerk of such court the warrant, if any, the minutes of the examination including the statements of the witnesses, the instruments of writing and other things used in evidence, the decision and action of the magistrate, the bail bond, if any, and the recognizances of the witnesses.

§ 71 ^[64] **Examining trial who may hold — practice.** If the magistrate, before whom the defendant is brought for an examination of the charge against him, be a justice of the peace, and the offense charged be a felony, he shall proceed with such defendant to another justice of the county, who shall be associated with him, and the two compose the examining court and perform the duties and exercise the powers as provided in this title, subject to the following rules: (*See act 1886, next page.*)

1. If they do not concur in the opinion that there are reasonable grounds for believing the defendant to be guilty of a public offense, he shall be discharged.

2. If they concur in the opinion that there are reasonable grounds for believing him to be guilty of a public offense, but differ as to the offense of which he is guilty, he shall be held for trial for the offense for which the least punishment is prescribed.

312; and see *Bethuram v. Black*, 11 Bush 628.

(4) A jailer has no authority to take bail, and a bail bond taken by him is not binding on the sureties either as a statutory or common law bond. *Com. v. Roberts*, 1 Duv. 199.

§ 70. Failure to comply with many of the provisions of this section are mere irregularities, but it is indispensable that the decision of the court requiring

party to give bail shall be filed in circuit court before there is a forfeiture. *Morgan v. Com.*, 12 Bush 84.

§ 71. **Bail bond taken by single justice** from a defendant charged with felony was held invalid in *Com. v. Fisher*, 2 Duv. 376; *Murphy v. Com.*, 11 Bush 217; *Revill v. Pettit*, 3 Met. 315; *Tharp v. Com.*, 3 Met. 412; but now one justice can hold an examining court. See act next page.

3. If they differ as to the sum in which the defendant should be held to bail, he shall be held in the smaller sum.

4. If they differ in the decision of any other question, the decision most favorable to the defendant shall prevail.

5. The justice before whom the defendant is first brought shall deliver the papers to the clerk, as prescribed in section seventy, and the other justice shall write down the evidence, unless they otherwise agree. (*Felony defined, sec. 6.*)

[ACT 1886.]

§ 1. **County judge exclusive jurisdiction in homicide.** That the judges of the county courts, in their respective counties, shall have as an examining court exclusive jurisdiction in all cases of homicide.

§ 2. **Trial held at county seat.** The examining trial for the offense in the first section of this act mentioned shall be held at the county seat of the county in which the offense is alleged to have been committed.

§ 3. **Who may preside if county judge can not.** When any person is arrested, charged with homicide, he shall be carried before the county judge, if in the county, for an examining trial. If the county judge is absent from the county, or can not properly preside in the case, the party arrested shall, by the officer or person having him in charge, be carried to the justice of the peace living nearest to the county seat for an examining trial, or to the police judge of the town which is the county seat for an examining trial. If the justice of the peace is absent from his district or police judge is absent from the town, or either of them can not properly preside, then any other justice of the peace may act as an examining court in the trial of the person arrested.

§ 4. **One justice may act.** One justice of the peace shall have all the rights, powers and jurisdiction now conferred by law on two justices of the peace as an examining court, provided said justice shall have no jurisdiction to act as an examining court in case of homicide, unless the party charged with said offense is brought before him pursuant to section three of this act.

§ 5. **County judge may act in any case.** This act shall not be construed as limiting the jurisdiction of the county judges as an examining court to the offense of homicide.

§ 6. **County judge receives no fee.** The county judge shall not receive any fee for services rendered as an examining court.

§ 7. Fee for holding court. A justice of the peace, police judge or other officer (except the county judge), acting as an examining court, shall receive for the first day as fee for his services two dollars; for each day thereafter one dollar: *Provided*, That in no case shall the fees exceed four dollars. The fees to be allowed, certified and paid as such fees are now paid: *Provided*, That nothing in this act shall deprive any police judge, city judge or mayor of a city in this Commonwealth of any jurisdiction they now have in regard to holding examining courts. And it is further provided—the provision of this section as to fees shall not apply to the judge of the city court of Louisville, and the judge of said city court of Louisville shall not receive any fees whatever for services rendered as an examining court, but shall be paid the same salary as now provided by law. (*See jurisdiction of police courts, page 551; fee for holding court, Ky. Stat., sec. 353.*)

§ 8. Validity of bail bond. A bond for the appearance of the defendant at any court shall be valid when taken by any officer having the power and right to sit as an examining court or who does in the case sit as an examining court.

TITLE V.

BAIL.

CHAPTER I. ADMISSION TO BAIL, 72.

II. SURRENDER OF THE DEFENDANT, 86.

III. DEPOSIT OF MONEY IN LIEU OF BAIL, 89.

IV. FORFEITURE OF BAIL, 93.

V. RECOMMITMENT AFTER GIVING BAIL AND DEPOSITING MONEY, 99.

CHAPTER I.

ADMISSION TO BAIL.

- § 72. Admission to bail defined.
- § 73. Taking of bail defined.
- § 74. Defendant may be bailed before conviction.
- § 75. Bail not allowed after conviction.
- § 76. Qualifications of bail.
- § 77. Bail to be examined on oath as to qualifications.
- § 78. Insufficient bail not to be taken.
- § 79. Bail to be taken if sufficient in the aggregate.
- § 80. Persons not to be taken as bail.
- § 81. Application for bail how made.
- § 82. Form of bail bond.
- § 83. Sheriff may take bail—responsibility for.
- § 84. Peace officers who may take bail.
- § 85. Irregular bail bond, validity of—duty of defendant.

§ 72 (67) **Admission to bail defined.** Admission to bail is an order from a competent court or magistrate, that the defendant be discharged from actual custody on bail. (*Who are magistrates, sec. 26.*)

§ 73 (68) **Taking of bail defined.** The taking of bail consists in the acceptance by a competent court, magistrate or officer, of the undertaking of sufficient bail for the appearance of the defendant accord-

§ 72. (1) **De facto officer.** "Where a man is exercising and discharging the general duties of an officer, claiming right thereto under commission or appointment, he is an officer *de facto*, and generally, if not universally, his acts are good as to third parties," and where the validity of a bail bond taken by a police judge was questioned on the ground that he had not taken the oath of office, the bond was held valid. *Rice v. Com.*, 3 Bush 14; and see further, as to definition

of *de facto* officer, *Creighton v. Com.*, 83 Ky. 142.

(2) **Order admitting to bail** need not be entered on the regular order book, but some memoranda on paper signed by the justice is necessary to show that a trial was had and the defendant admitted to bail. *Morgan v. Com.*, 12 Bush 84.

(3) See further, notes to sec. 49.

§ 73. (1) **Bond of defendant.** A bail bond or recognizance by a *defendant* in an indictment is unauthorized by law, and

ing to the terms of the undertaking, or that the bail will pay to the Commonwealth the specified sum. (*Who may take bail after commitment, sec. 68; and see references under sec. 74; who are magistrates, sec. 26.*)

§ 74 ⁽⁷⁰⁾ **Defendant may be bailed before conviction.** Before conviction the defendant may be admitted to bail—

1. For his appearance before a magistrate for an examination of the charge, if the offense charged be a misdemeanor; or,

2. For his appearance in the court to which he is sent for trial; or,

3. For his appearance to answer an indictment which has been found against him; or,

4. For his appearance in a penal action. (*Defendant may remain on bail during trial, secs. 183, 184; bail in police or justices' courts, secs. 309, 324; bail to answer indictment—who may take, secs. 141, 143, 144; or misdemeanor, secs. 28, 46; peace officers who may take bail, sec. 84.*)

§ 75 ⁽⁷¹⁾ **Bail not allowed after conviction.** After conviction, the defendant can not be admitted to bail.

§ 76 ⁽⁷²⁾ **Qualifications of bail.** The bail shall be residents of the Commonwealth, owners of visible property, over and above that exempt

is not obligatory on him either as a statutory or common law bond, but is binding on his surety. *Com. v. Radford*, 2 Duv. 9.

(2) **Invalid bail bonds.** Bond taken by county judge after commencement of term of court to which defendant was held to appear, sec. 68; *Branham v. Com.*, 2 Bush 3; *Creekmore v. Com.*, 5 Bush 312; bond taken by jailer, *Com. v. Roberts*, 1 Duv. 199; bond taken by sheriff from person whom he had arrested by authority of his bail, *Schneider v. Com.*, 3 Met. 410. In each of the foregoing cases it is held that a bond executed before an officer not authorized by law to take bail is not obligatory on the bail; and see further, notes to sec. 85, and as to exoneration of bail, see notes to sec. 93.

(3) **Person not to be accepted as bail.** See sec. 80; but if such persons become bail they are liable. 11 Bush 617.

§ 74. (1) **Bond taken by examining court** is invalid unless it appear from the record that an examining trial was held and the accused admitted to bail. *Morgan v. Com.*, 12 Bush 84.

(2) **Duty of bail.** It is the legal duty of the bail to act as the friendly custodian of his principal, and to see that he appears to answer the charge against him. *Ratcliff v. Smith*, 13 Bush 172.

(3) See further, secs. 46, 55 as to bail by examining court; and sec. 68 as to bail after commitment.

(4) **Sunday—bail.** A bail bond or recognizance executed on Sunday before an officer authorized to take bail is binding. *Rice v. Com.*, 3 Bush 14; *Watts v. Com.*, 5 Bush 309.

(5) **Surety—authority to fill bond.** Where a surety authorizes an officer to fill up a bail bond that he has signed, the officer has no power to delegate the authority to fill up the bond to another person. *Com. v. Ball*, 6 Bush 291; nor is surety who authorizes another verbally to sign his name bound, although the person so authorized signed name in presence of surety. *Billington v. Com.*, 79 Ky. 400.

§ 76. **Qualifications of bail.** Although this section requires the surety in a bail bond to be a resident of this State, yet if a non-resident be received as bail he

from execution, to the value of the sum in which bail is required, and shall be worth that amount after the payment of their debts and liabilities.

§ 77 [72] **Bail to be examined on oath as to qualifications.** The person or persons offered as bail shall be examined on oath in regard to their qualifications as bail, and any officer authorized to take bail is authorized to administer the oath, reduce the statements on oath to writing, and require the person offered as bail to sign the statement. Other proof may be also taken in regard to the sufficiency of the bail. (*Form of affidavit of bail, page 658.*)

§ 78 [74] **Insufficient bail not to be taken.** No person shall be taken as bail, unless the court, magistrate or officer be satisfied, from proof and examination on oath, of the sufficiency of such person, according to the requisitions of the preceding sections.

§ 79 [75] **Bail to be taken if sufficient in the aggregate.** If more than one person be offered as bail, they shall be deemed sufficient, if in the aggregate they possess the qualifications required.

§ 80. **Persons who shall not be taken as bail.** No officer shall take as bail any attorney at law, sheriff or deputy sheriff, judge, clerk or deputy clerk or master commissioner of the court in which the defendant is held to appear.

§ 81 [76] **Application for bail, how made.** If the defendant be committed to jail, and the application for bail be made to a magistrate or judge of the circuit court during vacation, it must be by a written petition, signed by the defendant or his counsel, briefly stating the offense for which he is committed, and naming the persons offered as bail. In all other cases, the application may be made orally to the court, magistrate or officer. (*Who may take bail after commitment, sec. 68.*)

§ 82 [77] **Form of bail bond.** The undertaking of the bail shall be substantially as follows:

"A B, being in custody, charged with the offense of (naming or briefly describing it), and being admitted to bail in the sum of—

will be bound. Com. v. Ramsay, 2 Duv. 385.

§ 80. **Sureties not qualified—Hable if taken.** If any of the persons mentioned in this section becomes surety in a bail bond he will be bound. Hollandsworth v. Com., 11 Bush 617. A contract between sureties in a bail bond that all were to be bound or none would be is not binding on the Commonwealth. *Id.*

§ 82. (1) **Form and validity of bond.** The words "shall at all times" after the

words "said charge and" and the words "if he fails to perform either of these conditions that we will pay to the Commonwealth of Kentucky the sum of — dollars" were left out, and the word "obedient" used in place of "amenable," but these omissions and alterations did not render the bond invalid. Miller v. Com., 1 Duv. 14.

(2) A bond that omitted the concluding provision that if defendant "failed to perform either of these con-

dollars, we, C D of (stating his place of residence), and E F (stating his place of residence), hereby undertake that the above-named A B, shall appear in the — court — day of its — term (or before the judge of the — county court, on the — day of —), to answer said charge, and shall at all times render himself amenable to the orders and process of said court in the prosecution of said charge; and, if convicted, shall render himself in execution thereof; or, if he fail to perform either of these conditions, that we will pay to the Commonwealth of Kentucky the sum of — dollars." (*Irregular bond is valid, sec. 85.*)

§ 83 (71) **Sheriff may take bail—responsibility for.** A sheriff or deputy sheriff arresting a person under a warrant or other process, in which it appears that the person is to be admitted to bail in a specified sum, may take the bail and discharge the person from actual custody. The sheriff shall be officially responsible for the sufficiency of bail taken by himself, or his deputy, as in taking bail in civil actions. (*Form of bond, page 657; bail may be sworn, qualifications of, secs. 76, 77; see further, as to officers who may take bail, sec. 28.*)

§ 84 (72) **Peace officers who may take bail.** Only the following peace officers shall take bail:

1. A sheriff or his deputy as authorized by law. (*See sec. 28.*)
2. The coroner of any county, in which the office of sheriff is vacant, may take bail, whenever the sheriff could have done so; and he shall be officially responsible for the sufficiency of bail taken by him, in the same manner as sheriffs are. (*Duty of other officers arresting persons entitled to bail, sec. 144.*)

ditions that we will pay to the Commonwealth of Kentucky the sum of — dollars," but valid in all other respects, is binding on the sureties. *Com. v. O'Daniel*, 9 Bush 551.

(3) Bond is not invalid because of omission of the name of the circuit court to which defendant was required to answer. *Com. v. Stegala*, 3 R. 686.

(4) A bond or recognizance that does not show that the bail undertook that the accused should appear before a magistrate or court, but is merely *conditioned as the law directs*, is invalid. *Roberts v. Com.*, 7 Bush 430.

(5) In *Baird v. Com.*, 2 Duv. 78, it was held that a single recognizance on two indictments was valid.

(6) Unless it can be ascertained from

(27)

the bond that the bail undertook that the defendant should appear before a magistrate for the examination of a charge, or before the court for trial thereon, it will be invalid. *Henry v. Com.*, 4 Bush 427.

(7) See further, notes to sec. 85.

§ 83. **Sheriff may take bail—when.** The sheriff arresting a person by authority of his bail is not authorized to take new bail; he can only take bail when he has made the arrest under a warrant, or other process in which it shall appear that the person is to be admitted to bail in a specified sum. *Schneider v. Com.*, 3 Met. 410.

§ 84. **Jailer can not take bail.** A jailer has no authority to take bail, and a bail bond taken by him is not binding on the

§ 85 (80) **Irregular bail bond, validity of—duty of defendant.** No bail bond or bail recognizance shall be deemed to be invalid by reason of any variance between its stipulations and the provisions of this Code, nor by the failure of the magistrate or officer to transmit or deliver the same at the times herein provided, nor by any other irregularity, provided it be made to appear that the defendant was legally in custody, charged with a public offense, and that he was discharged by reason of the giving of the bond or recognizance, and provided it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for the examination of the charge, or before a court for the trial thereof. If no day be fixed for such appearance, or an impossible day, or a day in vacation, the bond or recognizance, if for his appearance before a magistrate, shall be considered as binding the defendant so to appear and surrender himself into custody, for an examination of the charge, within twenty days from the time the bond or recognizance was given; and if for his appearance in a court for trial, shall be considered as binding the defendant so to appear and surrender himself into custody, on the first day of the next term of the court, which shall commence more than ten days after the time when the bond or recognizance is given.

sureties, either as a statutory or common law obligation. *Com. v. Roberts*, 1 Duv. 199; and see note 2, sec. 73.

§ 85. (1) **Joint recognizance.** The defendant being indicted for burglary and larceny in separate indictments, but for the same offense, he and his surety entered into a joint recognizance for his appearance to answer both indictments. The bond was valid, as there could be but one conviction and one punishment, the two indictments being in effect no more than two counts in the same indictment. *Baird v. Com.*, 2 Duv. 78.

(2) **Requisites of bond.** It is essential to the validity of a recognizance or bail bond that it appear that the defendant was, when recognized or bailed, legally in custody, charged with a public offense, and was discharged therefrom by reason of the giving of the bond or recognizance and that it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for an examination of the charge or be-

fore a court for the trial thereof. *Henry v. Com.*, 4 Bush 427; *Com. v. Cummings*, 18 B. M. 26.

(3) The omission of the concluding undertaking, that if the defendant failed to perform either of the conditions of the bond the sureties would pay to the Commonwealth the amount of the bail, did not render the bond invalid. *Com. v. O'Daniel*, 9 Bush 551; and see *Miller v. Com.*, 1 Duv. 14.

(4) It is indispensable to the validity of the bond that some judgment should be entered or memoranda made in writing, signed by the magistrate, showing that an examining court was held, and that the accused was admitted to bail. *Morgan v. Com.*, 12 Bush 84.

(5) See further, as to exoneration of bail, notes to sec. 93.

(6) **Void bond.** A surety whose name is signed to a bond by another person (although in his presence) without written authority so to do is not bound. *Billington v. Com.*, 79 Ky. 400.

(7) The defendant being required to

CHAPTER II.

SURRENDER OF THE DEFENDANT.

§ 86. Surrender of defendant discharges bail.

§ 87. Bail may arrest or have defendant arrested.

§ 88. Money deposited returned on surrender of defendant.

§ 86 [81] **Surrender of defendant discharges bail.** At any time before the forfeiture of their bond, the bail may surrender the defendant, or the defendant may surrender himself, to the jailer of the county in which the prosecution is pending, but the surrender must be accompanied with a certified copy of the bail bond to be delivered to the jailer, who must detain the defendant in custody thereon as upon a commitment, and give a written acknowledgment of the surrender; and the bail shall thereupon be exonerated. (*Form of acknowledgment of surrender, page 659.*)

give bond in the penalty of two hundred and fifty dollars in each of four separate and distinct prosecutions, executed a bond with surety for one thousand dollars, conditioned in the usual form. The sureties were held not bound, as the bond was for too great a penalty, they being liable under it for one thousand dollars in each case. *Cooper v. Com.*, 13 Bush 654.

(8) Unless the bond is taken by an officer authorized by law to accept bail, the bond will be void. *Covington v. Com.*, 3 Bush 478. Where a surety signed a blank bond with authority to the magistrate to fill it up, the magistrate had no power to authorize another person to fill up the bond; and the bond having been filled up by another person was not binding. *Com. v. Ball*, 6 Bush 291.

(9) Where the minutes of the examining court recited only "that the defendant and A and B, his sureties, were duly recognized in the sum of two hundred dollars, conditioned as the law directs," the sureties were not bound; the conditions should have been set out in the recognizance, or in the minutes of the examining court. *Roberts v. Com.*, 7 Bush 430.

§ 86. (1) **Surrender of defendant.** Before the forfeiture of their bond the bail have

a right to surrender the defendant to the jailer, whose duty it will be to detain him in custody "as upon a commitment," he may then be admitted to bail in the mode prescribed by secs. 68 and 81. *Schneider v. Com.*, 3 Met. 410.

(2) "A delivery to the jailer so as to exonerate the bail must be such as to give the jailer dominion over the accused, and this can ordinarily be done only by putting the accused in the apartment of the jail where prisoners are usually confined. *McKinney v. Com.*, 3 R. 465.

(3) Sureties in a recognizance are entitled to a jury to try whether there was a delivery by them of the defendant to the jailer. 3 R. 465.

(4) After the trial begins in a felony case the defendant is in the custody of the court, and the bail are not amenable for his presence unless they consent that he may remain on bail, but in order to be exonerated before the trial begins the bail must either surrender the defendant to the jailer or to the custody of the court if in session. *Willis v. Com.*, 85 Ky. 68.

(5) The surety in a bail bond can not exonerate himself by delivering the accused to the jailer of a county other than that in which prosecution is pend-

§ 87 ^[82] **Bail may arrest or have defendant arrested.** For the purpose of surrendering the defendant the bail, at any time before judgment against them, and at any place within the State, may arrest him; or, by an indorsement upon a certified copy of the bail bond or recognizance, signed by them, may direct the arrest to be made by any peace officer in the State, or by any other person over twenty-one years of age designated in the indorsement. (*Form of indorsement by bail, page 659; see further as to arrest after bail, sec. 99.*)

§ 88. **Money deposited returned on surrender of defendant.** If money have been deposited in lieu of bail, the defendant, at any time before the forfeiture thereof, may surrender himself to the jailer of the county in which the prosecution is pending, and procure from him a certificate of such surrender, and upon the production of such certificate, together with proof that the attorney for the Commonwealth has been served with a copy of the certificate and notice, of five days, that the application would be made; the court in which the prosecution is pending, or the judge thereof, must order the money to be returned to the person who deposited it. (*Form of certificate, page 659; notice, page 659.*)

CHAPTER III.

DEPOSIT OF MONEY IN LIEU OF BAIL.

§ 89. Defendant may deposit amount of bail and be discharged.

§ 90. Bail exonerated if amount of bond deposited.

§ 91. Money to be held by trustee of jury fund subject to order of court.

§ 92. Court may apply money deposited to pay fine and costs.

§ 89 ^[84] **Defendant may deposit bail and be discharged.** Whenever the defendant is admitted to bail in a specified sum, he may deposit said sum with the trustee of the jury fund of the county in which the trial is directed to be had, and take from the trustee a certificate of such deposit, upon delivering which to the officer in whose custody he is he shall be discharged. (*Form of certificate, page 659.*)

ing, but when he does so and the prisoner is released on a writ of *habeas corpus* the surety will be exonerated. *Smith v. Com.*, 91 Ky. 588.

§ 87. (1) **Arrest by bail.** Bail can not authorize the arrest of the accused by a third person in any other way than by his written indorsement on a certified copy of the bail bond or recognizance. *Marking v. Needy*, 8 Bush 22.

(2) **Sheriff arresting a person by authority of his bail** is not authorized to take new bail. *Schneider v. Com.*, 3 Met. 410.

§ 89. **Deposit in lieu of bail.** Money deposited with the committing officer in lieu of bail in order to secure the release of a prisoner, and by him paid to the trustee of the jury fund, will be forfeited by the failure of the defendant to appear. *Dean v. Com.*, 1 Bush 20.

§ 90 ⁽⁸⁸⁾ **Bail exonerated if amount of bond deposited.** After bail has been taken, a deposit may, in like manner, be made of the sum mentioned in the bail bond, which shall exonerate the bail.

§ 91 ⁽⁸⁹⁾ **Money to be held by trustee of jury fund.** If money be deposited, the trustee of the jury fund shall hold and pay the same according to the orders of the court having jurisdiction to try the offense, and he and his sureties shall be liable for the same on his official bond. (*If grand jury fail to indict money to be returned, sec. 115.*)

§ 92 ⁽⁹¹⁾ **Court may apply money to pay fine and costs.** Upon judgment being rendered against a defendant for a fine or costs, the court rendering judgment may order any money deposited, agreeably to the foregoing sections, to be applied to the payment thereof.

CHAPTER IV.

FORFEITURE OF BAIL.

- § 93. Forfeiture of bail if defendant fails to appear.
- § 94. Proceedings upon forfeiture.
- § 95. Attachment against property of bail.
- § 96. Court may discharge forfeiture at same term.
- § 97. Money forfeited placed to credit of jury fund.
- § 98. Remission of bail by court before judgment.

§ 93 ⁽⁹³⁾ **Forfeiture of bail if defendant fail to appear.** If the defendant fail to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself

§ 93. (1) **Exoneration of bail.** The surety in the bail bond will be released, if, after the execution of the bond, the defendant is arrested by the United States authorities and thereby prevented from appearing. *Com. v. Overby*, 90 Ky. 208; overruling *Com. v. House*, 13 Bush 680; and see *Com. v. Webster*, 1 Bush 616.

(2) That the defendant was absent in the Federal army at the time he was bound by a recognizance to appear in court to answer an indictment and was unable to procure a furlough to attend the court is a valid defense against the recognizance. *Com. v. Terry*, 2 Duv. 383.

(3) "If the Commonwealth by her own act prevented an appearance in dis-

charge of the recognizance she certainly should not enforce the penalty for non-appearance," as where the defendant is arrested in another county and thereby prevented from appearing. *Kirby v. Com.*, 1 Bush 113.

(4) Sureties in a bail bond are discharged by the rearrest of the accused and his commitment to jail, from which he made his escape during the pendency of a second examining trial for the same offense. *Medlin v. Com.*, 11 Bush 605.

(5) It is indispensable that the decision of the examining court requiring the defendant to give bail should be filed in the circuit court before there is a forfeiture of the bond. *Morgan v. Com.*, 12 Bush 84.

(6) See further, as to exoneration of

in execution of the judgment, the court must direct the fact to be entered on the record, and thereupon the bail bond, or the money deposited in lieu of bail, is forfeited. (*Forfeiture of bail in examining court, sec. 58.*)

§ 94 [90, 91, 92] **Proceedings upon forfeiture.** 1. Upon the forfeiture of a bail bond the court shall order a summons to be issued against the bail, requiring them to show cause, upon the first day of the next term of the court, why judgment should not be rendered against them, on the forfeiture, for the sum fixed in the bail bond.

2. If the court fail to make such order, the attorney for the Commonwealth may, at any time after the close of the term, cause such summons to be issued by the clerk of the court.

3. No pleadings shall be required on the part of the Commonwealth, but the summons shall be served, and all subsequent proceedings shall be the same as in an ordinary civil action. (*Form of summons, page 662; proceeding if bail forfeited in examining court, sec. 58.*)

bail by surrender of accused, sec. 86 and notes; and by fact that bond is invalid, notes to secs. 73, 82, 85.

(7) The surrender of the defendant in execution of the judgment rendered against him releases the surety, although he may fail to pay the fine imposed except by laying it out in jail. *Mitchell v. Com.*, 12 Bush 247.

(8) Order of court abating an indictment terminated the prosecution under that indictment; and the indictment having been reinstated on the docket and the defendant arrested, the sureties on the bond for his appearance were not bound. *Henry v. Com.*, 4 Bush 427. See further, notes to sec. 85.

(9) Where a defendant who had given bail for his appearance to answer an indictment for felony appeared in discharge of the recognizance and was put upon trial, during the progress of which he escaped, his bail was not liable. A different rule would apply in misdemeanors. *Askins v. Com.*, 1 Duv. 275; compare with *Com. v. Coleman*, 2 Met. 382.

(10) **Liability of bail.** The defendant was held by an examining court to answer at the ensuing October term of the circuit court, no indictment was found

against him at that term; at the next April term an indictment was found, and failing to appear the bond was forfeited and the sureties held liable. It is not necessary that there should be a trial and conviction in a misdemeanor case before the bond is forfeited. *Walker v. Com.*, 79 Ky. 293.

(11) The continuance of the case at the instance of the defendant, and the permission given him to stand upon his bond without the consent of his sureties, did not release them. The controlling principle is that until the defendant is surrendered, or his appearance entered in discharge of his bond, the sureties have the control of him and the court has not. *Miller v. Com.*, 1 Duv. 14; *Com. v. Coleman*, 2 Met. 382.

(12) The accused, being under bail, appeared in court, pleaded not guilty, but before the jury was impaneled, on his motion the indictment was set aside. The court ordered the case submitted to another grand jury and that the defendant be permitted to stand upon his bond. Another indictment being found the defendant failed to appear. The sureties were held liable. *Brewer v. Com.*, 3 Bush 550, sec. 159.

(13) The failure to forfeit the bond at

§ 95. **Attachment against property of bail.** When the sheriff or other officer shall return the summons, issued under section ninety-four, not executed, in whole or in part, and that the defendants, or any of them, are non-residents of this Commonwealth, or so conceal themselves or himself that the summons can not be executed upon them or him, the attorney for the Commonwealth may sue out an attachment against the estate of the defendants as to whom such return shall have been made, and proceed as provided in title eight, chapter three, of the Civil Code, except no affidavit nor bond shall be required: or he may in any case, after forfeiture, sue out an attachment for any of the causes enumerated in said chapter by making affidavit and executing bond as required therein.

the appearance term operated to extend the time during which the bail might surrender the defendant as provided in sec. 86. *Com. v. Branch*, 1 Bush 59.

(14) The defendant was held in the sum of five hundred dollars to answer in the circuit court; an indictment was found against him, and failing to appear a bench warrant fixing the bail at two hundred and fifty dollars was issued, under this warrant the defendant was arrested and made his escape from the officer; failing to appear at the next term the bond was forfeited and the sureties held bound for the payment of five hundred dollars. *Com. v. Branch*, 1 Bush 59.

(15) Where a defendant charged with felony was admitted to bail by the examining court to appear before the next May term of the circuit court, and no court was held at that term, the sureties were held bound for his appearance at the next ensuing term. *Com. v. Branch*, 1 Bush 59.

(16) Bail are not discharged until they have placed the defendant in the custody of the court, or have surrendered him to the jailer. A continuance from one term to another does not release the bail. Where a new court is created and all cases pending in the circuit court are transferred to it, the bail are bound for the defendant's appearance in the new court. *Ramey v. Com.*, 83 Ky. 534.

(17) A defendant charged with bastardy, who had given bail for his appearance, appeared and pleaded not

guilty, but was not surrendered or taken into custody, and having escaped his bail were not released. *Wintersoll v. Com.*, 1 Duv. 177.

(18) The arrest and imprisonment in another State of one who is charged with crime in this State, and out on bail, is not a good defense by the surety to proceedings on the forfeited recognizance. *Withrow v. Com.*, 1 Bush 17; *Yarbrough v. Com.*, 89 Ky. 151.

(19) The fact that the defendant could not appear without danger of losing his life by mob violence will not exonerate the bail, unless the authorities were applied to, and were unable or unwilling to extend to the accused the protection necessary to enable him to appear. *Weddington v. Com.*, 79 Ky. 582.

(20) If for any cause the indictment is defective and liable to be quashed, that fact does not render the recognizance void. *Com. v. Skeggs*, 3 Bush 19.

(21) **Practice — pleading.** When a defendant in a criminal case has appeared in discharge of each of several recognizances, and another is executed and he fails to appear in discharge of it, an order reciting the failure of the defendant "to appear in discharge of his recognizance," and declaring the same forfeited, refers to the recognizance last executed. In a proceeding against bail upon a forfeited recognizance all pleadings on the part of the Commonwealth are dispensed with; the office of the summons is simply to notify the bail of the forfeiture, and the failure to state in the summons

§ 96 (91) **Court may discharge forfeiture at same term.** If, before the final adjournment of the court, the defendant appear and satisfactorily excuse the failure, the court may discharge the forfeiture.

§ 97 (92) **Money forfeited placed to credit of jury fund.** If money be deposited in lieu of bail, after forfeiture and final adjournment of court, the trustee shall enter the sum deposited to the credit of the jury fund.

§ 98 (94) **Remission of bail by court before judgment.** If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond.

the amount specified in the bond is immaterial. *Tenney v. Com.*, 3 Met. 415.

(22) A summons which recites the date and amount of the recognizance, and by reference to the recognizance sufficiently identifies the offense, is sufficient. *Baird v. Com.*, 2 Duv. 78.

(23) The appearance of the parties to a motion and their agreement to set the hearing of it for a specified day, and a trial and judgment upon the merits, is a waiver of previous irregularities. *Com. v. Marks*, 2 Duv. 387.

(24) In proceeding upon a forfeited bond the defendant must make a written statement of the facts constituting his defense. *Brown v. Com.*, 4 Met. 222.

(25) The omission, in the order of forfeiture, to name the sureties or to give the date of the recognizance is not a fatal defect when the recognizance is otherwise sufficiently identified. *Miller v. Com.*, 1 Duv. 14.

(26) In a proceeding on a forfeited recognizance the court, on motion of the surety, quashed the indictment and rendered judgment for the forfeiture; on an appeal this judgment was affirmed. *Little v. Com.*, 3 Bush 22; *Com. v. Rowland*, 4 Met. 225.

(27) In a proceeding to recover against the personal representative of the bail no demand is necessary. *Arnold v. Com.*, 80 Ky. 135.

(28) Remission of amount due by bail. See sec. 98 and notes.

§ 98. (1) **Remission.** The Code confers on the court a judicial discretion to render judgment in a proceeding on the bond for such part of the penalty as

may be just and proper; this discretion is to be exercised judicially upon a consideration of all the facts of the case. *Com. v. Thornton*, 1 Met. 380; *Com. v. Coleman*, 2 Met. 382.

(2) A defendant indicted for felony, whose recognizance had been forfeited, surrendered himself to the court before a judgment was entered against the bail; the bail moved the court to dismiss the proceedings upon the forfeited bond; this, though not a formal, was a substantial application for remission, and the motion having been sustained by the court will not be disturbed. *Com. v. Coleman*, 2 Met. 382; *Com. v. Davidson*, 1 Bush 133.

(3) The power of the court to remit, in whole or in part, the penalty of a forfeited recognizance is a judicial, not an arbitrary, discretion, and the fact that the defendant has been either surrendered or arrested must be alleged and shown in the defense, and is indispensable to the exercise of the discretion allowed to be exercised by the court. *Com. v. Rowland*, 4 Met. 225; *Yarbrough v. Com.*, 80 Ky. 151.

(4) The court has power to set aside a judgment against the bail on the forfeited bond on the day it is entered, and remit the penalty. *Com. v. Runnion*, 3 Met. 2. See and compare *Com. v. Radford*, 2 Duv. 9.

(5) Neither the Commonwealth's attorney nor the clerk is entitled to commissions upon a forfeited bond unless a judgment has been rendered and it has been collected, in whole or in part. Where the governor remits the for-

CHAPTER V.

RECOMMITMENT AFTER GIVING BAIL OR DEPOSITING MONEY.

§ 99. Defendant on bail may be arrested.

§ 100. Clerk to issue warrant—defendant may be again bailed.

§ 99 ^[98] **Defendant on bail may be arrested.** The court in which a prosecution for a public offense is pending shall, by an order, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail or deposited money in lieu thereof, in the following cases :

1. When, by having failed to appear, a forfeiture of bail or of the money deposited has been incurred.

2. When the court is satisfied that his bail, or either of them, is dead, or insufficient, or has removed from the State.

3. Upon an indictment being found for an offense not bailable.

§ 100 ^[97] **Clerk to issue warrant—defendant may be again bailed.** Upon such order being made, the clerk shall issue process for the arrest and recommitment of the defendant. If the order be made in either of the cases mentioned in the first or second subdivisions of the preceding section, the defendant shall be admitted to bail as upon his first commitment, in a sum to be fixed by the court, and named in the process for his arrest. (*Who may take bail, secs. 68, 83.*)

feiture before judgment the attorney is not entitled to commission. Com. v. Offut, 82 Ky. 326; Com. v. Spraggins, 18 B. M. 512; Com. v. Ramsay, 2 Duv. 385; Brown v. Com., 4 Met. 222.

(6) The discretion of the circuit court

in remitting the penalty in a bail bond will not be controlled by the Court of Appeals unless flagrantly abused. Com. v. Davidson, 1 Bush 133; Com. v. Rowland, 4 Met. 225; Com. v. Coleman, 2 Met. 382; Yarbrough v. Com., 89 Ky. 151.

TITLE VI.

TRIAL.

- CHAPTER I. GRAND JURY, ITS POWERS AND DUTIES, 101.
- II. INDICTMENT, 118.
1. THE FINDING OF AN INDICTMENT, 118.
2. FORM AND REQUISITES OF AN INDICTMENT, 122.
- III. PROCESS ON AN INDICTMENT, 138.
- IV. PRODUCTION OF EVIDENCE, 150.
- V. ARRAIGNMENT AND PLEADINGS BY THE DEFENDANT, 154.
- VI. TRIAL, 180.
1. MODE OF TRIAL, 180.
2. TIME OF TRIAL, 185.
3. POSTPONEMENT OF TRIAL, 188.
4. THE JURY, 190.
5. CONDUCT OF JURY TRIAL, 217.
6. VERDICT, 255.
- VII. NEW TRIAL AND ARREST OF JUDGMENT, 269.
- VIII. BILLS OF EXCEPTION, 280.
- IX. JUDGMENT, 283.
- X. EXECUTION, 293.

CHAPTER I.

GRAND JURY, ITS POWERS AND DUTIES.

- § 101. Grand jury selection and formation of.
- § 102. Investigation and indictment.
- § 103. Free access to prisons and public records.
- § 104. Grand juror to disclose offenses known to him.
- § 105. Witnesses' attendance, how secured.
- § 106. Foreman can swear witnesses.
- § 107. Evidence that jury may hear.
- § 108. Witness—how compelled to testify.
- § 109. Court and Commonwealth's attorney to advise.
- § 110. Presence of persons when charge examined or voted on.
- § 111. Indictment should be found—when.
- § 112. Proceedings to be kept secret.
- § 113. Grand juror may be required to disclose testimony—when.
- § 114. Not responsible for acts or votes except per jury.
- § 115. Papers of examining court laid before—failure to indict—resubmission.
- § 116. Court may order charge dismissed resubmitted.
- § 117. Failure to indict at succeeding term—effect.

§ 101 (a) **Grand jury selection and formation of.** The selecting, summoning and impaneling of a grand jury shall be as prescribed in the General

§ 101. (1) **Grand jury.** The summoning of bystanders to serve on the grand jury is a duty in the performance of which the accused is entitled to the services of sheriff or coroner, the court has no authority to authorize any other person to summon bystanders on the grand jury, and is ground for quashing

Statutes [now Kentucky Statutes]. (*As to grand juries in police courts, sec. 307. See Ky. Stat., sec. 2241, for provisions concerning juries.*)

§ 102 ^(99, 105) **Investigation and indictment.** It is the duty of the grand jury to inquire:

1. Into the case of every person imprisoned in the county jail, or on bail, to answer a criminal charge in that court, and who is not indicted.

2. Into the condition and management of the public prisons in the county.

3. Into the willful and corrupt misconduct in office, of public officers of every description, in the county.

4. Concerning all public offenses of which the court in which they are impaneled has jurisdiction: and to indict such persons as they may find guilty thereof. (*When indictment to state locality of misdemeanor, sec. 16; as to jurisdiction, see secs. 13 to 25.*)

§ 103 ⁽¹⁰⁶⁾ **Free access to prisons and public records.** They are entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records in the county.

§ 104 ⁽¹⁰⁴⁾ **Grand juror to disclose offenses known to him.** If a member of the grand jury know, or have reason to believe, that a public offense has been committed within the jurisdiction of the court, he must declare the same to his fellow-jurors, who must thereupon investigate the same.

§ 105 ⁽¹¹²⁾ **Witnesses' attendance, how secured.** The clerk, on the request of the foreman of the grand jury, or of the Commonwealth's attorney, during a term or in vacation, shall issue subpoenas for witnesses to appear before the grand jury, and upon the witnesses failing to attend, in obedience thereto, the court shall proceed to coerce their attendance, and may punish their disobedience by fine and imprisonment, as in the case of witnesses failing to attend on the trial. (*Subpœna for witnesses in vacation, Ky. Stat., sec. 381.*)

§ 106 ⁽¹⁰¹⁾ **Foreman can swear witnesses.** The foreman of the grand jury

indictment. *Com. v. Graddy*, 4 Met. 223.

(2) It did not appear in the order of court that one of those selected as grand jurors was appointed by the judge as foreman, which the law requires to be done, or that they were sworn, but in the absence of evidence to the contrary it will be presumed both were done. *Com. v. Pullan*, 3 Bush 47.

(3) That a member of the grand jury was a school trustee when the indictment was found, is no ground for

setting it aside. *Com. v. Pritchett*, 11 Bush 277.

(4) See further, as to qualifications of grand juror, *Ky. Stat.*, sec. 2248; as to finding and presentment of indictment, secs. 118-121 of Code; as to ground upon which indictment may set aside, sec. 158 of Code and notes thereto.

§ 102. (1) **Power of grand jury over indictments.** See note 2 to sec. 159.

(2) **Sec. as to foreman and oath to jury,** *Ky. Stat.*, sec. 2250; and secs. 118-121, and 158 of the Code.

shall have power to administer the oath to the witnesses appearing before the grand jury.

§ 107 [102] **Evidence that jury may hear.** The grand jury can receive none but legal evidence; they are not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence before them, and if they believe that other evidence, within their reach, will explain away the charge, they should order the evidence to be produced.

§ 108 [113] **Witness—how compelled to testify.** When a witness under examination refuses to testify, or to answer a question put to him by the grand jury, or by the attorney for the Commonwealth, the foreman shall proceed with the witness into the presence of the court, and there distinctly state the refusal of the witness, and if the court, upon hearing the witness, shall decide that he is bound to testify or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and if he do, shall proceed with him as in cases of similar refusal in open court.

§ 109 [107] **Court and Commonwealth's attorney to advise.** The grand jury may, at all reasonable times, ask the advice of the court, or the attorney of the Commonwealth; and such attorney may, when requested by the grand jury, interrogate witnesses before it.

§ 110 [108] **Presence of others when charge examined or voted on.** No person except the attorney for the Commonwealth and the witness under examination shall be present while the grand jury are examining a charge; and no person whatever while they are deliberating or voting on a charge. (*Presence of other persons cause for setting aside indictment, sec. 158.*)

§ 111 [103] **Indictment should be found—when.** The grand jury should find an indictment when all the evidence before them would, in their judgment, if unexplained, warrant a conviction by the trial jury.

§ 112 [109] **Proceedings to be kept secret.** Every member of a grand jury must keep secret whatever he himself, or any other grand juror, may have said, or in what manner he, or any other grand juror, may have voted on a matter before them.

§ 113 [110] **Grand juror may be compelled to disclose testimony—when.** A member of the grand jury may, however, be required by a court to disclose

§ 107. **Evidence grand jury shall hear.** The court has no power to set aside an indictment because incompetent testimony was heard by the grand jury. *Com. v. Minor, 89 Ky. 555.*

§ 109. **Power of grand jury over indictments.** See note 2, sec. 159.

§ 112. **Proceedings to be kept secret.** The testimony of grand jurors is not competent to explain the grounds of their decision or to impeach the validity of their finding. *Com. v. Skeggs, 3 Bush 19.* See notes to sec. 158.

§ 113. **False swearing.** It was held be-

the testimony of a witness examined before the grand jury, for the purpose of ascertaining its consistency with the testimony given by the witness on the trial, or for the purpose of proceeding against the witness for perjury [or false swearing] in his testimony, or upon the trial of a prosecution of the witness for perjury [or false swearing]; and it shall be the duty of the foreman of the grand jury to communicate to the attorney for the Commonwealth, when requested, the substance of the testimony before them. (*Words in brackets inserted by act 1892.*)

§ 114^[111] **Not responsible for acts or votes, except perjury.** A grand juror can not be questioned for anything he may say, or any vote he may give, relative to a matter legally before the grand jury, except for a perjury he may have committed in making an accusation, or giving testimony, before his fellow-jurors.

§ 115^[114] **Papers of examining court laid before—failure to indict—resubmission.** All the papers and other matters of evidence relating to the arrest of, and examination of the charge against, persons committed, or on bail, returned to court by magistrates, shall be laid before the grand jury, and if, upon investigation, they refuse to find an indictment, they shall write upon some one of the papers “dismissed,” with the signature of the foreman, and thereupon the court shall discharge the defendant from custody, if in jail, or exonerate the bail, if bail have been given, and order the return of any money which may have been deposited, in lieu of bail, to the person depositing it, unless the court be of opinion that the charge should be submitted to another grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of the court.

§ 116^[118] **Court may order charge dismissed resubmitted.** The dismissal of the charge does not prevent it being again submitted to a grand jury, as often as the court may direct, but without such direction it can not again be submitted. (*Reference to grand jury, secs. 159, 160; dismissal, when not a bar, sec. 178.*)

§ 117^[116] **Failure to indict at succeeding term—effect.** Unless an indictment be found at the term of the court next after the first submission

fore amendment to this section that a grand juror was not a competent witness in a prosecution for false swearing. *Com. v. Scowden*, 92 Ky. 120; and see Ky. Stat., sec. 1174.

§ 114. **Grand juror not liable.** A grand juror is not civilly liable in an action for damages for anything he may have said, or any vote he may have given relative to any matter legally before the grand jury. *Ullman v. Abrahams*, 9 Bush 738.

§ 117. (1) **Failure to indict releases bail.**

Where the grand jury fails to indict as provided in this section the bail is exonerated, although no order is entered discharging the bond. *Bryant v. Com.*, 3 Bush 9; *Com. v. Blincoe*, 3 Bush 12; *Com. v. Roberts*, 4 Met. 219. Sec. 116, Code of 1854, provided that the defendant should be discharged “*unless for cause shown*” the court should otherwise direct; these words are omitted from this

of the charge to the grand jury, the same proceedings shall be had as directed in section one hundred and fifteen upon a dismissal of the charge, unless the court otherwise direct. (*Reference to grand jury, secs. 159, 160.*)

CHAPTER II.

INDICTMENT.

- ARTICLE 1. THE FINDING OF AN INDICTMENT, 118.
2. THE FORM AND REQUISITES OF AN INDICTMENT, 122.

ARTICLE 1.

THE FINDING OF AN INDICTMENT.

- § 118. Indictment defined.
§ 119. Nine jurors must concur—foreman to indorse.
§ 120. Names of witnesses to be written on indictment.
§ 121. Manner of presenting to court—clerk to file.

§ 118 ^[117] **Indictment defined.** An indictment is an accusation in writing, found and presented by a grand jury to the court in which they are empaneled, charging a person with the commission of a public offense. (*Lost or stolen indictment, see Ky. Stat., sec. 1140.*)

§ 119 ^[118] **Nine jurors to concur—foreman to indorse.** The concurrence of [twelve] grand jurors is required to find an indictment; when so found, it must be indorsed “a true bill,” and the indorsement signed by the foreman. (*Nine may find indictment, see Constitution, sec. 248.*)

section. See *Rion v. Com.*, 1 Duv. 235; *Com. v. Roberts*, 4 Met. 219, construing sec. 116, Code of 1854.

(2) Attorney for Commonwealth must state in writing reasons for dismissal. *Ky. Stat.*, sec. 123.

§ 118. (1) **Court no power to change charge** in an indictment, even with consent of accused, although the facts stated in indictment constitute a different offense from that charged. *Com. v. Adams*, 92 Ky. 134.

(2) **Failure to dispose of an indictment.** Where a defendant was indicted for murder, and after the expiration of several years another indictment was found against him for same offense, under

which he was tried without any order having been made disposing of former indictment, the court held that the substantial rights of the accused were not prejudiced. *Blyew v. Com.*, 91 Ky. 200.

(3) **Indictment lost or stolen—limitation.** See *Ky. Stat.*, sec. 1140.

(4) **New indictment may be found** in county to which a change of venue is taken. *Ky. Stat.*, sec. 1177, and defendant can not object to it because found in that county. *Parker v. Com.*, 12 Bush 191; *Jenning v. Com.*, 13 R. 79.

(5) See further, sec. 158 and notes.

§ 119. (1) **Construction of section.** This section is mandatory, and the indictment must be indorsed a “true bill” and

§ 120 ^[119] **Names of witnesses to be written on indictment.** When an indictment is found, the names of all the witnesses who were examined must be written at the foot of or on the indictment.

§ 121 ^[120] **Manner of presenting indictment to court—clerk to file.** The indictment must be presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk, and remain in his office as a public record.

ARTICLE 2.

FORM AND REQUISITES OF AN INDICTMENT.

- § 122. Requisites of an indictment.
- § 123. Form of indictment.
- § 124. Facts concerning which it must be direct and certain.
- § 125. Error in name of accused may be corrected.
- § 126. To charge but one offense—exception.
- § 127. Joinder of offenses in indictment.
- § 128. Statements as to person injured or owner of property.
- § 129. Time offense committed—statement as to.
- § 130. Presumptions of law need not be stated—judicial notice.
- § 131. Judgment how pleaded—jurisdictional facts.
- § 132. Libel—allegations of indictment for.
- § 133. Written instruments—description of.
- § 134. Perjury or subornation of—necessary allegations.
- § 135. Larceny or embezzlement of money—sufficiency of indictment.
- § 136. Words of statute defining offense need not be strictly followed.
- § 137. Construction of words used in indictment.

§ 122 ^[121, 122, 123] **Requisites of an indictment.** The indictment must contain—

signed by the foreman. *Oliver v. Com.*, 95 Ky. 372; *Pence v. Com.*, 95 Ky. 618; 86 Ky. 313; but the right to object to an indictment because defective in these respects is waived by failing to demur or move to set it aside. *Patterson v. Com.*, 86 Ky. 313.

(2) **Foreman of grand jury—oath to jury.** Ky. Stat., sec. 2250.

§ 121. (1) **Filing indictment.** When the record shows that an indictment is returned into court as required by Code and ordered to be filed, the failure of the clerk to sign the indorsement on back of indictment to the effect that it was filed in open court will not authorize its dismissal. *Patterson v. Com.*, 86 Ky. 313; *Pearce v. Com.*, 10 R. 178.

(2) Clerk's indorsement of filing of indictment is not essential, and when omitted may be supplied. *Pence v. Com.*, 95 Ky. 618.

(3) **Presenting indictment.** An indictment for grand larceny for stealing sheep was indorsed on its back and described in the order filing it as an indictment for "sheep stealing." Held sufficient identification of the indictment. *Com. v. English*, 6 Bush 431.

(4) It is not necessary to the validity of an indictment that it should show upon its face that it had been presented *on oath* by the grand jury. *Jane v. Com.*, 3 Met. 18.

(5) See further, sec. 158 and notes.

§ 122. (1) **Abortion.** It is necessary that an indictment for abortion should

1. The title of the prosecution, specifying the name of the court in which the indictment is presented and the names of the parties.

allege that the mother was quick with child, and that the potion was administered with the intention to destroy the life of the child, and that such was its effect. *Mitchell v. Com.*, 78 Ky. 204; but where the indictment is for the death of the mother as the result of an abortion, it is not necessary to allege that deceased was "quick" with child. *Peoples v. Com.*, 87 Ky. 487.

(2) **Accessory.** An accessory before the fact is in legal contemplation guilty of murder if guilty at all; and an indictment in which the offense charged is murder is good, although the particular circumstances of the offense as set out in the indictment constitute the person an accessory before the fact and not a principal. *Stricklin v. Com.*, 83 Ky. 566; and see as to accessory after the fact, *Tully v. Com.*, 11 Bush 154; *Tully v. Com.*, 13 Bush 142; *Able v. Com.*, 5 Bush 698.

(3) See further, as to accessory before the fact, Ky. Stat., sec. 1128; after the fact, Ky. Stat., sec. 1129.

(4) **Aiders and abettors.** When two persons are jointly indicted for murder, one as principal and the other as aider and abettor, the one charged as principal may be found guilty of aiding and abetting, and the one charged with aiding and abetting may be found guilty as principal. *Benge v. Com.*, 92 Ky. 1.

(5) Aider and abettor in crime created by statute punishable. *Com. v. Carter*, 94 Ky. 527; overruling *Stamper v. Com.*, 7 Bush 612; and see *Frey v. Com.*, 83 Ky. 191.

(6) An indictment against A and B, which in one count charges both of them with a felony, and in another count charges A as principal and B as an aider and abettor, and in the third count charges B as principal and A as aider and abettor is good, and one of them may be found guilty of a felony and the other of a misdemeanor. *Cupp v. Com.*, 87 Ky. 35; and see Ky. Stat., secs. 1128, 1129.

(7) Aiders and abettors in crime of house-breaking. *Ward v. Com.*, 14 Bush 233; and see Ky. Stat., 1162.

(8) Aiders and abettors in crime of malicious shooting or wounding. See Ky. Stat., sec. 1166, and *Com. v. Patrick*, 80 Ky. 605, where it is held that under this statute the person who committed the offense must be charged with it, and then others may also be charged with aiding and abetting in it, but all of them can not be charged as principals; and see 87 Ky. 35.

(9) Aiders and abettors in crime of rape. *Kessler v. Com.*, 12 Bush 18; Ky. Stat., 1152; in crime of house-breaking, *Mullins v. Com.*, 14 R. 569.

(10) "In order to convict one as aider and abettor the indictment must include the principal actor jointly, or disclose who he is together with a description of his acts." *Mulligan v. Com.*, 84 Ky. 229; and see *Benge v. Com.*, 92 Ky. 1.

(11) **Arson.** The ownership of the property was sufficiently alleged in an indictment that charged that the house was occupied by Hattie Taylor as a residence. It is not necessary that the name of the owner in fee be given. Under an indictment for arson the defendant may be convicted of the crime of an attempt to commit arson. *Young v. Com.*, 12 Bush 243.

(12) An indictment charging that offense was committed "feloniously and willfully," omitting the word "maliciously," is sufficient for the common law offense. *Aikman v. Com.*, 13 R. 894; *Young v. Com.*, 12 Bush 243. The Ky. Stat., sec. 1170, in defining certain kinds of arson, uses the word "maliciously" but in cases *supra* it is held that the word "feloniously" embraces the word "maliciously."

(13) The failure of indictment to expressly aver that dwelling house was occupied as a residence does not vitiate it, if it is charged that the dwelling-house was occupied. *Com. v. Elliston*, 14 R. 216; Ky. Stat., sec. 1170.

(14) See further, as to indictment for burning a barn or warehouse, *Deshazer v. Com.*, 12 R. 453; *Evans v. Com.*, 11 R. 573; Ky. Stat., sec. 1169; or church edifice, *McDonald v. Com.*, 86 Ky. 10.

2. A statement of the acts constituting the offense, in ordinary

(15) **Assault and battery.** An assault and battery is punishable by either fine or imprisonment or both fine and imprisonment, in the discretion of the jury. *Cornelison v. Com.*, 84 Ky. 583.

(16) An indictment charging that the defendant "did in sudden heat and passion, without previous malice and not in self-defense, strike and wound G with a pair of blacksmith's tongs, which said tongs was then and there a deadly weapon" is good only as an indictment for assault and battery. *Com. v. Hawkins*, 11 Bush 603. A former conviction for a breach of the peace is a bar to a subsequent prosecution for an assault and battery for the same act. *Id.*

(17) Under an indictment for a simple assault it is error to admit proof of a battery; every battery includes an assault, but an assault does not include a battery; an assault and battery is an offense of a higher grade than a simple assault. *Furnish v. Com.*, 14 Bush 180; see further, as to degrees of offense secs. 262-264.

(18) **Bigamy.** An indictment for bigamy charging that "Eliza Davis on the — day of May, 1877, in the county and State aforesaid, and before the finding of this indictment, having a husband then living, unlawfully married John Mackey," is not sufficient; it should aver the place of the first marriage and set out the name of the first husband or wife. *Davis v. Com.*, 13 Bush 318, overruling *Com. v. Whaley*, 6 Bush 266; and see Ky. Stat., sec. 1216.

(19) "It is immaterial in an indictment for bigamy at what particular date the first marriage occurred, if the accused had at time of second marriage a living wife to whom he had been previously married." *Faustre v. Com.*, 92 Ky. 34; and see as to immaterial variance in name of first wife, note 3, sec. 124.

(20) The offense of bigamy committed by marrying in another State while the former marriage is in force is not an offense against the laws of this State. *Johnson v. Com.*, 86 Ky. 122.

(21) **Bribery.** As to sufficiency of indictment for, see Ky. Stat., secs. 1586, (28)

1587; and *Johnson v. Com.*, 90 Ky. 53; *Cheek v. Com.*, 87 Ky. 42; *Com. v. Selby*, 87 Ky. 594. *Com. v. Root*, 16 R. 491.

(22) **Burglary.** An indictment for burglary described the house "as the house of A. Dominick" held sufficient description. To make out the offense of burglary it is not necessary to prove that goods were actually stolen and carried away, it is sufficient if the storehouse was feloniously broken with the intention of so doing, nor is it necessary to charge that the house was "burglariously" broken and entered. *Charles Olive v. Com.*, 5 Bush 376; see *Com. v. Bruce*, 79 Ky. 560; and see Ky. Stat., sec. 1159. *Larceny* is a degree of the offense. *Com. v. Prewitt*, 82 Ky. 240. *Triplett v. Com.*, 84 Ky. 193.

(23) **Caption of indictment** which omits name of county in which it was found is not defective when the body of indictment states the county. *Johnson v. Com.*, 12 R. 835.

(24) **Confederating and banding** together to intimidate. Ky. Stat., sec. 1223; *Buchanan v. Com.*, 95 Ky. 334.

(25) **Conspiracy to commit crime.** Definition of and necessary allegations in indictment for. *Com. v. Ward*, 92 Ky. 158.

(26) **Corporation liable to indictment** for an offense which is either a misfeasance or a nonfeasance of duty to the public the punishment for which is a fine, as for permitting gaming on premises under its control. *Com. v. Pulaski Co. A. & M. Association*, 92 Ky. 197.

(27) **Counterfeiting.** In an indictment for counterfeiting it is necessary to allege that the bank on which the bill purported to be was a bank incorporated by law. *Kennedy v. Com.*, 2 Met. 36; *Clark v. Com.*, 16 B. M. 206; and to identify with reasonable certainty the coin. *Com. v. Fields*, 5 R. 610; and see Ky. Stat., sec. 1181.

(28) **Defacing brands on logs**—requisites of indictment for. *Com. v. Puckett*, 92 Ky. 206; *Johnson v. Com.*, 14 R. 257; and see Ky. Stat., sec. 1409.

(29) **Directness and certainty** in stating offense, see sec. 124 and notes.

and concise language, and in such a manner as to enable a person

(30) **Duelling.** See *Moody v. Com.*, 4 Met. 1; and *Ky. Stat.*, sec. 1269.

(31) **Embezzlement.** *Ky. Stat.*, sec. 1202, and *Shelburn v. Com.*, 85 Ky. 173, holding that a clerk, business manager or other agent is not guilty of embezzlement where money converted by him was collected by him for his principal and with his authority; and see *Com. v. Clifford*, 16 R. —. Nor is agent of individual who fails to pay over money to his principal guilty of embezzlement. *Com. v. Bull*, 5 R. 605. Indictment for, need not specify the coin or number or denomination of money taken. *Jones v. Com.*, 13 Bush 356.

(32) Generally where the agent has received goods or money to carry, deliver or control for his principal, unless the agent parts with the manual possession and delivers the property to the principal or another for him or places it in some depository to which the principal has access, or over which he has control, he can not be convicted of larceny for a felonious appropriation of it, the offense being embezzlement. *War-moth v. Com.*, 81 Ky. 133; *Johnson v. Com.*, 5 Bush 430; *Barclay v. Breckinridge*, 4 Met. 374; *Snapp v. Com.*, 82 Ky. 173.

(33) **False pretense.** An indictment for obtaining property under false pretenses must aver what the false pretenses were and that they related to some pretended past occurrence or existing fact, and were made for the purpose of inducing the party injured to part with his property; no statement of anything to take place in future is a false pretense within the meaning of the act. *Glackan v. Com.*, 3 Met. 232; *Com. v. Haughey*, 3 Met. 224; nor can the prosecution be maintained if the party defrauded had the means of detection at hand. *Com. v. Grady*, 13 Bush 285; and where the false pretense is made in one State and the money or property obtained in another, the courts of the latter have jurisdiction of the offense. *Com. v. Van Tuyl*, 1 Met. 1; it is not material whether or not property obtained belonged to person alleged to be owner of it in indict-

ment. *Hennessey v. Com.*, 88 Ky. 301; nor is value of article obtained material. *Jackson v. Com.*, 86 Ky. 1.

(34) If one obtains a loan of money from another by a false statement as to an existing fact, although he intends to repay it, he is guilty; as is one who, while in the possession of money belonging to another, obtains the title by a false pretense, it is not necessary in latter case that possession should have been obtained by false pretense. *Com. v. Schwartz*, 92 Ky. 510; see *Ky. Stat.*, sec. 1208, and *Com. v. Moore*, 89 Ky. 542; *Com. v. Barnett*, 95 Ky. 302.

(35) **False swearing.** One can not be punished for false swearing unless the false oath was taken on a subject on which he could be legally sworn and before a person legally authorized to administer an oath. *Kerfoot v. Com.*, 89 Ky. 174; *Com. v. Kane*, 92 Ky. 457; indictment should follow precise words of statute. *Com. v. Taylor*, 16 R. 482; see *Ky. Stat.*, sec. 1174.

(36) An indictment for false swearing under the statute will be sufficient if it allege that the false oath was taken knowingly and willfully on a subject concerning which the party could be legally sworn, and before a person legally authorized to administer the oath. It is not necessary that the false oath should be taken in a matter judicially pending at the time, or concerning a matter material to any point in issue. *Com. v. Powell*, 2 Met. 10; and see *Com. v. Still*, 83 Ky. 275; *Richey v. Com.*, 81 Ky. 524; *Biggerstaff v. Com.*, 11 Bush 169; *Com. v. Maynard*, 91 Ky. 131; *Spencer v. Com.*, 15 R. 182.

(37) The matter alleged to have been sworn must be negatived by special averment in the indictment. *Com. v. Kane*, 92 Ky. 457; *Com. v. Still*, 83 Ky. 275; see further, notes to sec. 134.

(38) **Forgery.** To charge that the accused "did forge the name of A to an instrument of writing purporting to be the promissory note of M for \$380, payable to C fourteen months after date, and dated 4th of March, 1872, with intent to defraud," is not sufficient; if the in-

of common understanding to know what is intended; and

dictment had charged that the accused signed A's name to the instrument without authority, or that he procured somebody else to so sign it, with the intention to defraud, it may have been good. As to whether it is necessary to aver the person intended to be defrauded is not decided, but the acts constituting the offense must be set out. *Stowers v. Com.*, 12 Bush 342; and see *Mount v. Com.* 1 Duv. 90; and see sec. 133, and Ky. Stat., sec. 1185.

(39) Indictment alleging that defendant did "utter and publish" as true a certain false "forged and counterfeited" order charged but a single offense. *Johnson v. Com.*, 90 Ky. 488. One may be guilty of forgery by signing a writing in his own name if it be false in any material part and calculated to induce another to give credit to it as genuine. *Com. v. Wilson*, 89 Ky. 157.

(40) Indictment for uttering a forged writing must state the acts constituting the uttering and not the forging of the writing. An allegation in the indictment that defendant knew the writing to be false embraces the charge that it was so in fact. *Lockard v. Com.*, 87 Ky. 201; *Purvis v. Com.*, 13 R. 744; see further as to forgery of bank check, *Rawlins v. Com.*, 7 R. 595; *Kennedy v. Com.*, 2 Met. 36; as to alteration of bank check, *Com. v. Hide*, 94 Ky. 517; as to forgery of witness certificate, *Moore v. Com.*, 92 Ky. 630.

(41) **Former convictions.** Necessary allegations in indictment charging former convictions. *Boggs v. Com.*, 9 R. 342; *Mount v. Com.*, 2 Duv. 93; *Taylor v. Com.*, 3 R. 783; *Stewart v. Com.*, 2 R. 386; *Chenoweth v. Com.*, 11 R. 563; and see Ky. Stat., sec. 1130.

(42) **Gaming.** An indictment charging the defendant with permitting "a game of chance called pigeon-hole" to be played for "greenbacks" in his house is good on demurrer. *Com. v. Branham*, 3 Bush 1.

(43) An indictment for setting-up and keeping a keno table must aver that it is a contrivance ordinarily used for gaming. *Com. v. Monarch*, 6 Bush 298; and see

Ritte v. Com., 18 B. M. 35; Ky. Stat., sec. 1960.

(44) In an indictment for setting-up, exhibiting and keeping a faro bank, it is sufficient to allege that it was set-up, exhibited and kept, without adding any words descriptive or explanatory of the purpose for which it was or may be used, the faro bank being mentioned in the statute by name. *Waddell v. Com.*, 84 Ky. 276; *Com. v. Monarch*, 6 Bush 298.

(45) An indictment charging that defendant suffered certain named persons "to play in a house or on premises in the county aforesaid, then in the occupation and under the control of the said Perrigo, a game of cards, at which game of cards played as aforesaid, money or property was won and lost" is not sufficient, being too indefinite. *Com. v. Perrigo*, 3 Met. 5.

(46) An indictment charging that the defendant "was the owner, occupier and controller of a house and ten-pin alley at which games were played and money and other things bet, won and lost by his permission, and that he and others played at such games, and money and other valuable things were bet, lost and won thereon," is sufficient. *Com. v. Fraize*, 5 Bush 325.

(47) A corporation may be indicted for permitting gaming on its premises. *Com. v. Pulaski A. and M. Association*, 92 Ky. 197.

(48) Indictment charging that defendant did "unlawfully set-up, exhibit and keep for himself and another" a faro bank, charges but a single offense. *Vowells v. Com.*, 84 Ky. 52; see Ky. Stat., sec. 1960.

(49) **House-breaking.** See Ky. Stat., sec. 1162; and *Com. v. Ward*, 14 Bush 233, where it is held that indictment must charge that the taking was with the intention to deprive the owner of his property or to convert it to the use of the accused; but in *Com. v. Wicker*, 9 R. 474, the court say it is not necessary to allege the name of the owner of the property taken, nor to aver that it was taken without the owner's consent and with the intention to convert it to his own use; to the same effect is *Mitchell*

with such degree of certainty as to enable the court to pro-

v. Com., 88 Ky. 349, where Com. v. Ward is distinguished, and Johnson v. Com., 87 Ky. 189, holding that it is not necessary to describe the owner of the house, or property taken with any more certainty than is necessary to inform accused of the offense charged, and bar a second prosecution therefor. See further, Com. v. Bruce, 79 Ky. 560; Farris v. Com., 90 Ky. 637; but to constitute offense there must be a breaking. Webb v. Com., 87 Ky. 129; and an aider and abettor may be convicted. Mullins v. Com., 14 R. 569.

(50) **Infanticide.** An indictment charging that the defendant "did feloniously conceal the birth of a bastard child, the issue of her body, by secreting the said child so that it might not be known whether or not it had been born alive," is not good; the acts showing what the defendant did should have been set out. Foster v. Com., 12 Bush 373; and see Com. v. Hopkins, 9 R. 432; Wade v. Com., 1 R. 408; Frey v. Com., 83 Ky. 190, and Ky. Stat., sec. 1220.

(51) **Injury to property.** Sufficiency of indictment under secs. 1256, 1257, Ky. Stat.; Ellis v. Com., 78 Ky. 130; Com. v. Powell, 8 Bush 7; Com. v. Searls, 3 R. 394.

(52) **Joint indictment** against several, if it appear in proof that either is guilty he may be punished the same as if indicted alone. Weatherford v. Com., 10 Bush 196.

(53) **Larceny.** An indictment charging the defendant with feloniously stealing, taking and carrying away "one twenty dollar note and one ten dollar note, both of said notes being of the United States currency commonly called greenbacks. Said notes are not and were not before the grand jury, and could not by said jury be had before it, because the whereabouts of said notes was not and could not be known to said jury; therefore, said notes can not be more particularly described, either as to their date, number, or as to whether they belonged to the class technically called green or black backs," is sufficient under section 135. Jones v. Com., 13 Bush 356. Rhodes v. Com., 2 Duv. 157, was decided under

Code of 1854; and see sec. 135, which was not in Code of 1854, and Com. v. Mann, 12 R. 477; Ky. Stat., sec. 1194.

(54) An allegation that the property stolen was "the property of the Tennessee River Packet Company, D. W. Swan, Little Brothers and others," is sufficient as to the ownership of the property. Reed v. Com., 7 Bush 641.

(55) As to what constitutes larceny, see Elliott v. Com., 12 Bush 176; Nichols v. Com., 78 Ky. 180; Williams v. Com., 78 Ky. 93; Miller v. Com., 78 Ky. 15; Warmouth v. Com., 81 Ky. 133; Snapp v. Com., 82 Ky. 173; Ky. Stat., sec. 1194.

(56) Chandeliers attached to the freehold are held to be the subject of larceny, and it is immaterial whether the carrying away was immediate and continuous, or the removal was at different periods after severance. Smith v. Com., 14 Bush 31.

(57) **Local option.** "A person may in the same indictment be charged with more than one violation of the local option law, as it is called; but each offense should be separately charged, and the statement of the particular circumstances of each should be direct and certain." South v. Com., 79 Ky. 493; and see Young v. Com., 14 Bush 161; indicating how indictment should be drawn; and Ky. Stat., sec. 2557.

(58) **Physician — indictment against** under local option law. Com. v. Green, 80 Ky. 178; Com. v. Minor, 88 Ky. 422; Sawls v. Com., 83 Ky. 327.

(59) **Lottery.** As to indictments for selling lottery tickets, see Com. v. Bierman, 13 Bush 345; Com. v. Bull, 13 Bush 656. For promoting and aiding the promotion of a lottery, see Miller v. Com., 13 Bush 731; and Ky. Stat., sec. 2573.

(60) **Murder.** An indictment charging murder in the following language, to-wit: "The said William White heretofore, to-wit: on the — day of April, 1871, in the Commonwealth and county aforesaid, did unlawfully, willfully, maliciously, feloniously and of his malice aforethought, kill and murder his wife, one Nancy White," is insufficient, in that it fails to state the acts showing how

nounce judgment, on conviction, according to the right of the case.

offense was committed. *White v. Com.*, 9 Bush 178. Where the indictment charges that the defendant did "kill and murder" it is not necessary to add that the deceased died within a year and a day. *Jane v. Com.*, 3 Met. 18; and see *Alford v. Com.*, 84 Ky. 623. See Ky. Stat., sec. 1149.

(61) An indictment for a common law offense (murder) should charge that the act was done "feloniously," or "with a felonious intent." *Kaelin v. Com.*, 84 Ky. 354. Where the indictment charges that the defendant shot the deceased, inflicting wounds from which death resulted, it is not necessary to aver that the pistol with which the shooting was done was a deadly weapon, or that it was at the time loaded with a leaden ball or other hard substance. *Jeffries v. Com.*, 84 Ky. 237.

(62) An indictment in which the offense charged is murder is good, although the particular circumstances of the crime as set out in the indictment constitute an accessory before the fact and not a principal. *Stricklin v. Com.*, 83 Ky. 566.

(63) An indictment charging that "The said Matt. F. Lightfoot, in the county aforesaid, did willfully, feloniously and with malice aforethought, kill and murder Joseph McDermott, with a pistol, loaded with powder and leaden ball and other such substance, which he, the said Lightfoot, then and there held in his hands," is not aptly drawn, as it does not appear whether the accused shot the deceased or beat him over the head with the pistol, but there being no demurrer it was held sufficient after verdict. *Lightfoot v. Com.*, 80 Ky. 516, and see 11 R. 867.

(64) **Nuisance.** As to indictment for, see *C. R. Co. v. Com.*, 80 Ky. 137; *P. & E. R. R. Co. v. Com.*, 80 Ky. 147; *L. C. & L. R. R. Co. v. Com.*, 80 Ky. 143.

(65) **Peddling.** See *Com. v. Smith*, 6 Bush 303; *Monk v. Com.*, 6 Bush 397; *Com. v. Dudley*, 3 Met. 221; and Ky. Stat., sec. 4215; peddlers of patent rights

can not be required to pay a license tax. *Com. v. Petty*, 16 R. 188.

(66) **Perjury.** Ky. Stat., sec. 1173, and *Com. v. Maynard*, 91 Ky. 181, holding that perjury is the willful giving under oath in a judicial proceeding or in the course of justice of false testimony material to the issue or point of inquiry; and indictment must negative by special averment the matter alleged to have been sworn and expressly aver that it was material or state facts so showing, and also charge that defendant was sworn by one authorized to administer an oath; and see *Com. v. Powell*, 2 Met. 10; *Dowdy v. Com.*, 13 R. 350; and see sec. 134 and notes.

(67) **Rape.** An indictment that fails to charge that the accused detained the female against her will for the purpose, or with the intent, of having carnal knowledge of her is not good. *Wilder v. Com.*, 81 Ky. 591; and see *Blair v. Com.*, 7 Bush 227; *Kessler v. Com.*, 12 Bush 18; *Fenston v. Com.*, 82 Ky. 549; *Evans v. Com.*, 79 Ky. 414; *Bethel v. Com.*, 80 Ky. 526; and Ky. Stat., sec. 1152.

(68) As to degrees of rape see notes to sec. 263; and *Fenston v. Com.*, 82 Ky. 549; *Bethel v. Com.*, 80 Ky. 526; *Young v. Com.*, 16 R. 496; unlawfully detaining a woman, see note 79 and Ky. Stat., sec. 1158.

(69) **Receiving illegal vote.** See *Com. v. Gray*, 2 Duv. 373, and Ky. Stat., sec. 1583.

(70) **Robbery.** An indictment charging the defendant with having feloniously taken a mare, the property of William Rayburn, "in his presence, and against his will, by putting him in fear of some immediate injury to his person" is sufficient. *Com. v. Brooks*, 1 Duv. 150; and see *Ward v. Com.*, 14 Bush 233; *Dickerson v. Com.*, 2 Bush 1; *Taylor v. Com.*, 3 Bush 508; *Lisle v. Com.*, 82 Ky. 250; Ky. Stat., sec. 1159; larceny is a degree of the offense. *Com. v. Prewitt*, 82 Ky. 240; as is an assault to rob. See *Barnard v. Com.*, 94 Ky. 285.

(71) **Selling liquor.** An indictment against a merchant for selling liquor without license must state to whom the

§ 123 ^[122] **Form of indictment.** It may be substantially of the following form:

The Commonwealth of Kentucky, }
 against } Franklin Circuit Court.
 George Smith.

The grand jury of Franklin county, in the name and by the

sale was made. *Wilson v. Com.*, 14 Bush 159. See *Com. v. White*, 18 B. M. 492. An indictment for selling liquor to an inebriate must allege that the defendant knew the party was an inebriate. *Com. v. Bell*, 14 Bush 433; *Ky. Stat.*, sec. 1307; and see *Com. v. Ewing*, 7 Bush 105; *Com. v. Davis*, 12 Bush 240; *Megowan v. Com.*, 2 Met. 3; and see *Ky. Stat.*

(72) For selling liquor to a minor. See *Ky. Stat.*, sec. 1306, and *Com. v. Hadcraft*, 6 Bush 91.

(73) **Statutory offenses.** Sufficiency of indictment for, see sec. 136 and notes.

(74) **Sunday—for working on.** See requisites of petition in penal action to recover penalty for. *Com. v. L. & N. R. R.*, 80 Ky. 291; *L. & N. R. R. v. Com.*, 92 Ky. 114.

(75) **Tavern.** An indictment against a tavern-keeper for failing to set up in a public room a list of rates must allege when the rates were fixed by the county court, or that they had been fixed one month before the offense was committed. *Jackson v. Com.*, 7 Bush 99.

(76) **Time**—allegation as to in indictment, see sec. 129 and notes.

(77) **Trespass.** An indictment properly describing the offense denounced in sec. 7, art. 28, chap. 39, *Gen. Stat* [now *Ky. Stat.*, sec. 1256], but terming it an indictment for "malicious mischief" instead of "willful trespass," is good. *Com. v. Smith*, 6 Bush 263.

(78) An indictment charging that the defendant "unlawfully and without felonious intent destroyed, injured and carried away timber from four trees on the premises of John W. Wash, which said property belonged to the said Wash and was taken without his consent," is sufficient. *Com. v. Powell*, 8 Bush 7; and see *Ellis v. Com.*, 78 Ky. 130.

(79) **Unlawfully detaining a woman.** See *Ky. Stat.*, sec. 1158; and *Wilder v. Com.*,

81 Ky. 591; *Gargill v. Com.*, 12 R. 149; *Owens v. Com.*, 5 R. 174; *Higgins v. Com.*, 94 Ky. 54.

(80) **Unnecessary particularity.** Where a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved. *Clark v. Com.*, 16 B. M. 207; but an unnecessary and immaterial averment will be regarded as surplusage and it is not necessary to prove it. *Com. v. Jarboe*, 89 Ky. 143.

(81) **Usurpation.** For requisites of an indictment for usurping the office of judge of an election, see *Wayman v. Com.*, 14 Bush 466. Usurpation of an officer, see *Ky. Stat.*, sec. 1364; *Wayman v. Com.*, 14 Bush 446; *Com. v. Adams*, 3 Met. 6; *Com. v. Jones*, 10 Bush 725.

(82) **Warehouse.** For requisites of indictment under the act in relation to warehousemen, approved March 6, 1869, *Ky. Stat.*, sec. 4768; see *Com. v. Mason*, 82 Ky. 256.

(83) **Weapon.** Under an indictment charging that defendant carried "concealed deadly weapons, to-wit, a bowie-knife, and also a dirk or dagger," proof that he carried either will authorize a conviction. *Com. v. Howard*, 3 M. 407; *Ky. Stat.*, sec. 1309.

(84) **Willful killing.** Under sec. 1151, *Ky. Stat.*, see *Conner v. Com.*, 13 Bush 714.

(85) **Wounding.** Indictment under *Ky. Stat.*, sec. 1166, need not charge that act was done feloniously. *Cundiff v. Com.*, 86 Ky. 196; and *Burns v. Com.*, 3 Met. 13; *Flint v. Com.*, 81 Ky. 186; as to wounding in sudden heat and passion, as described in sec. 1242, *Ky. Stat.*, see *Com. v. Hawkins*, 11 Bush —; *Sosh v. Com.*, 4 R. 254; *Com. v. Duncan*, 91 Ky. 592.

§ 123. (1) **Form.** It is not necessary now that an indictment founded on a

authority of the Commonwealth of Kentucky, accuse George Smith of the crime of [here give the name of the offense, if it have one, such as treason, murder, manslaughter, arson, larceny, rape, etc., or the like, or, if it have no general name, then a brief general description as given by law], committed as follows, viz.: The said George Smith, on the — day of —, 1853, in the county aforesaid [here insert the acts constituting the offense], against the peace and dignity of the Commonwealth of Kentucky. (*See other forms, pages 663-670.*)

§ 124 [123] **Facts concerning which it must be direct and certain.** The indictment must be direct and certain as regards—

1. The party charged.
2. The offense charged.
3. The county in which the offense was committed.
4. The particular circumstances of the offense charged, if they be necessary to constitute a complete offense.

statute should conclude "against the form of the statute." *Com. v. Kennedy*, 15 B. M. 531.

(2) It is not necessary that the style of the court, or the case, or the formal part of the indictment shall be repeated in each count when there is more than one count. *Greenwood v. Com.*, 11 R. 220.

(3) **Caption of indictment**, omitting name of county, does not render indictment bad. *Johnson v. Com.*, 12 R. 835.

§ 124. (1) **Certainty in stating offense.** A conviction for stealing Philip Daniel's hog can not be sustained under an indictment for stealing Stephen Daniel's hog. *Hensley v. Com.*, 1 Bush 11. An indictment for murder described the person murdered as "Barbara Kriel." The proof disclosed her name to be "Margaret Kriel." The variance was held not material. *Kriel v. Com.*, 5 Bush 362; see sec. 125.

(2) On the trial of an indictment for stealing the horse of A evidence that the horse stolen belonged to B does not warrant a conviction, unless the offense be sufficiently described in other respects to identify the property and the act. *McBride v. Com.*, 13 Bush 337; sec. 128.

(3) In a trial for bigamy it appeared that first wife was sometimes called Mag Sharp (her real name) and sometimes Mag White, while the indictment

charged her name as Mag White; held not a fatal variance. *Robinson v. Com.*, 88 Ky. 386.

(4) It is essential that the indictment shall state correctly the county in which the offense is committed. When a change of venue is obtained and a new indictment found in the county to which the venue is taken, it should state correctly the county in which offense was committed. *Parker v. Com.*, 12 Bush 191. An indictment charging that offense was committed "in the county and circuit aforesaid" was held sufficient, although county was not named. *Armstrong v. Com.*, 16 R. 494.

(5) The omission of the word "weapon" in an indictment charging defendant with the offense of "carrying concealed a deadly —" does not vitiate indictment, as the language unmistakably indicates the omitted word, and enables the court to supply it with absolute certainty. *Com. v. Bary*, 1 R. 281.

(6) "It is essential that an indictment contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." An indictment charging murder in the following words is insufficient: "The said William White heretofore, to-wit, on the — day

125 ^[124] **Error in name of defendant may be corrected.** An error as to the name of the defendant shall not vitiate the indictment, nor proceedings thereon, and if his true name be discovered at any time before execution, an entry shall be made on the record of the court of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name, substantially as follows:

The Commonwealth of Kentucky
against
A B, indicted by the name of C D. }

§ 126 ^[125] **Indictment to charge but one offense—exception.** An indictment, except in the cases mentioned in the next section, must charge but

of April, 1871, in the Commonwealth and county aforesaid did unlawfully, willfully, maliciously, feloniously and of his malice aforethought kill and murder his wife, one Nancy White, against the peace and dignity of the Commonwealth of Kentucky," in that it fails to contain a statement of the acts constituting the offense. *White v. Com.*, 9 Bush 178; and see *Com. v. Perrigo*, 3 Met. 5; *Jane v. Com.*, 3 Met. 18; *Jefferies v. Com.*, 84 Ky. 237; *Mulligan v. Com.*, 84 Ky. 229; *Conner v. Com.*, 13 Bush 714; *Com. v. Riley*, 14 Bush 44; *Furnish v. Com.*, 14 Bush 180; *Tully v. Com.*, 11 Bush 154; *Alford v. Com.*, 84 Ky. 623.

(7) Under an indictment charging that the defendant carried "concealed deadly weapons, to-wit, a bowie knife and also a dirk or dagger," he could be convicted on proof that he carried either. *Com. v. Howard*, 3 Met. 407.

(8) Indictment charging A with the offense "of cutting John Refft with intent to kill him," committed in manner as follows: "The said A did unlawfully, willfully and feloniously cut, thrust and stab John Refft with a knife, from which cutting and stabbing said Refft did not die," is sufficient. *Shouse v. Com.*, 95 Ky. 621.

(9) Under a statute providing that if a person "sell to any person in any quantity whisky, brandy, or other spirituous liquor" an indictment charging "that Charles White on the 1st day of July, 1857, in the county aforesaid, did unlawfully sell whisky, brandy and other spirituous liquors" was held insufficient

in not being specific enough. *Com. v. White*, 18 B. M. 492.

(10) **Statutory offenses — indictment for.** "It is well settled that where provisos and exceptions are contained in distinct clauses (of a statute) it is not necessary to aver in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains." *Com. v. McClanahan*, 2 Met. 8; and see further, sec. 136 and notes.

(11) **Surplusage—unnecessary particularity.** Where an indictment contains a particular description of the acts constituting the offense, describing them with more minuteness than is necessary, the offense in its character and terms must be proved as alleged in the indictment. *Com. v. Magowan*, 1 Met. 368; *Clark v. Com.*, 16 B. M. 206.

(12) The fact that an indictment for manslaughter charges that offense was committed maliciously does not render it bad, as the word "maliciously" will be regarded as surplusage. *Coe v. Com.*, 94 Ky. 606; and see further, *Com. v. Jarboe*, 89 Ky. 143; 88 Ky. 368.

§ 125. Name. The omission to set out the first or Christian name of the defendant will not vitiate the indictment. *Com. v. Kelcher*, 3 Met. 485; nor is it fatal variance where indictment for bigamy stated first wife's name as Mag White, while her real name was Mag Sharp, as she went by both names. *Robinson v. Com.*, 88 Ky. 386.

§ 126. (1) Misjoinder of offenses—what is not. An indictment for murder con-

one offense, but, if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative. (*Jurisdiction of all degrees of offense included, sec. 14; degrees of offense defined, sec. 263.*)

§ 127 ^[130] **Joinder of offenses in indictment.** The offenses named in each of the subdivisions of this section may be charged in one indictment:

tained three paragraphs, "the first of which charges that the murder was committed by all five of the accused jointly; the second charges that Hunter committed the murder and that the other defendants did with malice aforethought counsel, advise and persuade the said Hunter to kill and murder the deceased; and in the third paragraph or count it is charged that the appellant (Thompson) committed the murder, and that the other defendants in like manner counseled and advised the commission of the offense." Held that there was no misjoinder of offenses, that but one offense was charged, although alleged to have been committed in different modes. *Thompson v. Com.*, 1 Met. 13.

(2) An indictment charging that defendant did "unlawfully set-up, exhibit and keep for himself and another a faro bank," charges but one offense. *Vowels v. Com.*, 84 Ky. 53.

(3) An indictment charging the taking at the same time and by the same act of one silver dollar, and a warrant of arrest issued against the accused and properly in the hands of the person robbed for execution as an officer, does not allege two offenses. *Lisle v. Com.*, 82 Ky. 250.

(4) An indictment may charge that three persons did the shooting, and in separate counts charge that each one of them did the shooting, and in other counts that each aided and abetted the other. *Angel v. Com.*, 14 R. 10.

(5) An indictment for "breaking a storehouse with intent to steal and stealing articles therefrom" charges but one offense, although it alleges both a breaking with intent to steal and an actual stealing. *Farris v. Com.*, 90 Ky. 637.

(6) If several articles, each belonging to different persons be stolen at same

time, only one offense has been committed. *Nichols v. Com.*, 78 Ky. 180; and so if the several articles are owned by the same person, 1 Bush 211.

(7) Two or more persons indicted as the actual perpetrators of a crime may be convicted as principals, although some of them are only aiders or abettors, or the aider and abettor may be indicted alone, but in such case the indictment should set out the acts of the principal actor. *Mulligan v. Com.*, 84 Ky. 220.

(8) When two or more persons are jointly indicted for murder, one as principal and the others as aiders and abettors, the one charged as principal may be found guilty of aiding and abetting, and the ones charged with aiding and abetting be found guilty as principals. *Benge v. Com.*, 92 Ky. 1.

(9) An indictment against A and B, which in one count charges both of them with a felony, and in another count charges A as principal and B as an aider and abettor, and in the third count charges B as principal and A as aider and abettor, is good, and one of them may be found guilty of a felony and the other of a misdemeanor. *Cupp v. Com.*, 87 Ky. 35. See further, *Ky. Stat.*, secs. 1128, 1129.

(10) An indictment charging that defendant destroyed, injured and carried away timber from four trees, the property of another, charges but one offense. *Com. v. Powell*, 8 Bush 7; *Com. v. Searls*, 3 R. 394.

(11) **Misjoinder—what is.** Indictment charging offense embraced by sec. 1256, *Ky. Stat.*, and also particular acts relating exclusively to sec. 1257, is bad because charging more than one offense. *Ellis v. Com.*, 78 Ky. 130; and see *Com. v. Smith*, 6 Bush 263.

§ 127. (1) **Misjoinder—practice.** See In-

1. Larceny and knowingly receiving stolen property.
2. Larceny and obtaining money or property on false pretenses.
3. Larceny and embezzlement.
4. Robbery and burglary.
5. Robbery and an assault with intent to rob.
6. Passing or attempting to pass counterfeit money or United States currency or bank notes, knowing them to be such, and having in possession counterfeit money or United States currency or bank notes, knowing them to be such, with the intention of circulating the same. (*One offense may be dismissed, if misjoinder, sec. 168.*)

§ 128 ^[127] **Statement as to person injured, or owner of property.** If an offense involve the commission of, or an attempt to commit, an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or attempted to be injured, or as to the owner of the property taken or injured or attempted to be injured, is not material.

§ 129 ^[130] **Time offense committed—statement as to.** The statement in the indictment, as to the time at which the offense was committed, is

dictment charging two offenses under secs. 1256, 1257, Ky. Stat.; *Ellis v. Com.*, 78 Ky. 130; and see further, *Com. v. Powell*, 8 Bush 7; *Com. v. Searls*, 3 R. 394; and see as to practice where there is a misjoinder, secs. 165, 168.

(2) **Offenses that may be joined.** Grand larceny and receiving stolen goods may be joined. *Upton v. Com.*, 14 R. 165.

§ 128. (1) **Statement as to person injured or owner of property.** Under an indictment for stealing the horse of W. F. Watson, the defendant can not be convicted if the proof is that he stole the horse of Cassan Watson. "In a case like this, where there is a variance in the proof and the averment as to ownership, it must prove fatal to the prosecution unless the offense be sufficiently described in other respects with such certainty as to identify the act; and if in the present case the horse had been minutely described, so as to have identified it whether it belonged to A or B, as the horse alleged to have been stolen, the fact that the name of the owner had been improperly stated would have been regarded as

immaterial." *McBride v. Com.*, 13 Bush 337.

(2) In an indictment for housebreaking it is not necessary to describe the owner of the house broken or the property taken with any more precision or certainty than is necessary to inform the accused of the nature of the accusation against him and to bar a second conviction. *Johnson v. Com.*, 87 Ky. 139.

(3) In an indictment for burglary a description of the house entered will be sufficient; that will bar another prosecution for the same offense. *Olive v. Com.*, 5 Bush 376.

(4) Under an indictment for obtaining money under false pretenses it is not material whether the money obtained belonged to the person alleged in the indictment. *Hennessy v. Com.*, 88 Ky. 301.

§ 129. (1) **Time—statement as to.** An indictment found at the May term, 1865, which charges that the offense was committed on the—day of July, 1865, and afterward in describing the offense in the indictment it is in express terms charged to have been committed before the find-

not material further than as a statement that it was committed before the time of finding the indictment, unless the time be a material ingredient in the offense.

§ 130 ⁽¹³³⁾ **Presumptions of law—judicial notice.** Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment.

§ 131 ⁽¹³³⁾ **Judgment how pleaded—jurisdictional facts.** In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it is not necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction must, however, be established on the trial.

§ 132 ⁽¹³⁴⁾ **Libel—allegations of indictment for.** An indictment for libel need not set forth any extrinsic facts, for the purpose of showing the application, to the party libeled, of the defamatory matter; but it is sufficient to state generally that the same was published concerning him. (*As to jurisdiction, see sec. 21.*)

ing of the indictment, is good. *Jones v. Com.*, 1 Bush 34.

(2) In a prosecution for nuisance the Commonwealth was not confined to the day alleged in the indictment, but had the right to prove the commission of the offense on any day within twelve months before the finding of the indictment. *C. R. Co. v. Com.*, 80 Ky. 137.

(3) The court is authorized on demurrer to assume that the offense was committed at the time charged in the indictment, although the Commonwealth on the trial would not be confined to the time alleged. *Com. v. Cain*, 14 Bush 525.

(4) An indictment which charges that the offense was committed on the same day the indictment is filed in court will be good if the indictment charge that the offense was committed before the time of finding the indictment. *Com. v. Miller*, 79 Ky. 451.

(5) Averment that offense was committed on the — day of July, 1883, imports the commission of it anterior to the 24th of the same month, when indictment was filed. *Vowels v. Com.*, 84 Ky. 53.

(6) In a prosecution for false swearing the date of the commission of the offense is not material, and a variance be-

tween date charged and record of proceeding in which false oath was taken does not render record incompetent. *Com. v. Davis*, 94 Ky. 612; *Richey v. Com.*, 81 Ky. 525.

(7) Where the defendant is indicted for different offenses of the same character committed within a year, the Commonwealth may in one trial confine itself to one act, and it will not be a bar to other trials. 88 Ky. 368; see note 28 to sec. 176.

(8) An indictment for bigamy charged that on the — day of September, 1891, the accused married, having then a wife, to whom he was married on September 19, 1891; the court held that the date was not material, and that figures 1891 were used by mistake in place of 1881. *Faustre v. Com.*, 92 Ky. 34.

(9) An indictment for house-breaking, found on December 28, 1891, alleged that offense was committed on December 20, 1891, and contained no specific averment that offense was committed prior to finding of indictment; held good. *Williams v. Com.*, 13 R. 893.

(10) An indictment for perjury stated that offense was committed October 1, 1892; the evidence showed that trial when accused swore falsely occurred

§ 133 ^[138] **Written instrument—description of.** If a written instrument, which is the subject of an indictment for forgery, larceny or other offense, have been withheld or destroyed by the act or procurement of the defendant, and such destruction or withholding be alleged in the indictment, and proved on the trial, a misdescription of the instrument is immaterial.

§ 134 ^[139] **Perjury or subornation of—necessary allegations.** In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court, or the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed.

§ 135. **Larceny or embezzlement of money—sufficiency of indictment.** In an indictment for the larceny or embezzlement of money, or United States currency, or bank notes, it is sufficient to allege the larceny or embezzlement of the same without specifying the coin, number, denomination or kind thereof.

§ 136 ^[137] **Words of statute defining offense need not be strictly pursued.** The words used in a statute to define an offense need not be strictly

September 19, 1892, the variance was held immaterial. *Com. v. Davis*, 15 R. 262.

(11) Two indictments for same offense committed at different times. See as to when proof in one case is and is not a bar to prosecution of other indictment. *C. & O. R. R. v. Com.*, 88 Ky. 368.

(12) An indictment for murder failed to state when killing took place, but as there was no demurrer filed to it the court would not consider the objection made. *Lightfoot v. Com.*, 80 Ky. 516.

§ 134. (1) **Perjury.** See Ky. Stat., sec. 1173 and notes; and note 66 to sec. 122 of Code.

(2) A conviction for perjury or false swearing may be had upon documentary or written evidence alone without a living witness. *Com. v. Davis*, 92 Ky. 460.

(3) Facts being averred in an indictment for perjury showing that defendant

was sworn in the usual form, the additional averment that he took his "corporal oath" was mere surplusage. *Com. v. Jarboe*, 89 Ky. 143.

(4) Definition of perjury. *Com. v. Powell*, 2 Met. 10; *Com. v. Maynard*, 91 Ky. 131.

§ 135. **Larceny—sufficiency of description.** An indictment charging that James M. Mann did "feloniously take, steal and carry away from the possession of Penn and Floyd money, currency of the realm, to the amount of over ten dollars" sufficiently describes the money. *Com. v. Mann*, 12 R. 477; and see *Jones v. Com.*, 13 Bush 356; Ky. Stat., sec. 1194; and notes 53-56, sec. 122.

§ 136. (1) **Statute—indictment under.** "Where the words of the statute are descriptive of the offense, the indictment will be sufficient if it shall follow the language and expressly charge the de-

pursued in an indictment, but other words conveying the same meaning may be used.

§ 137 ^[135] **Construction of words used in indictment.** The words used in an indictment must be construed according to their usual acceptation in common language, except words and phrases defined by law; which are to be construed according to their legal meaning.

scribed offense of the defendant. But this rule applies only to offenses which are complete in themselves, when the acts set out in the statute have been done or performed." *Davis v. Com.*, 13 Bush 318; *Ward v. Com.*, 14 Bush 233; *Mitchell v. Com.*, 88 Ky. 349.

(2) An indictment under the "kuklux law" will be sufficient if it charges the offense in the words of the statute. *Sellers v. Com.*, 13 Bush 331; *Buchanan v. Com.*, 95 Ky. 334; *Ky. Stat.*, 1223.

(3) "Where the words of the statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense on the defendant, or it will be defective." *Com. v. Tanner*, 5 Bush 316; *Com. v. Turner*, 8 Bush 1; *Conner v. Com.*, 13 Bush 714.

(4) "When a statute contains provisos or exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions or to negative the provisos it contains. *Com. v. Bull*, 13 Bush 656; *Com. v. Bierman*, 13 Bush 345; but "if the statute creating an offense contains in its enacting clause exceptions it is necessary to negative such exceptions in the indictment so as to show that the defendant does not come within any of them." *Conner v. Com.*, 13 Bush 714.

(5) Under the statute providing that it should be an offense to carry concealed deadly weapons except by certain persons who were specified it was not necessary to state that the defendant did not come within any of the exceptions. *Com. v. McClanahan*, 2 Met. 8.

(6) "If a statute refers to a common law offense by its popular name, as, for instance, 'robbery,' and proceeds to impose a penalty for its commission, it is not sufficient to charge the accused with

its commission in the statutory terms alone; in such cases the pleader must define the offense by stating the common law elements necessary to its commission." *Mitchell v. Com.*, 88 Ky. 349.

(7) An indictment for an offense created by statute need not charge that the acts complained of were done "feloniously" unless the statute requires that the act should be done feloniously in order to constitute the offense. *Higgins v. Com.*, 94 Ky. 54; *Cundiff v. Com.*, 86 Ky. 196.

(8) An indictment for the violation of a penal statute need not indicate the statute upon which it is founded; it is sufficient to bring the case within the provisions of the statute. *Powers v. Com.*, 90 Ky. 167.

(9) If the statute declares, as in rape, that it shall be an offense if the act is "unlawfully" done, it need not be charged that accused acted maliciously, willfully or feloniously; if he be charged in the language of the statute creating the crime and in the manner required by it, then the charge is complete." *Higgins v. Com.*, 94 Ky. 54.

(10) An indictment under sec. 2, art. 6, chap. 29, *Gen. Stat.* [now sec. 1166, *Ky. Stat.*], is good, although it fails to charge that the person wounded "did not die thereby" and fails to allege that the pistol was "loaded with a leaden bullet or other hard substance." *Burns v. Com.*, 3 Met. 14.

(11) An indictment charging that "the defendant did unlawfully, feloniously and maliciously, with intent to kill him, cut and wound one Philip Yeiser," is sufficient under sec. 2, art. 6, chap. 29, *Gen. Stat.* [now sec. 1166, *Ky. Stat.*]. *Flint v. Com.*, 81 Ky. 186; 16 R. 465.

(12) Aider and abettor in statutory crime may be punished unless it clearly appear that its provisions were only in-

CHAPTER III.

PROCESS UPON AN INDICTMENT.

- § 138. Writs for arrest or summons.
- § 139. Process of arrest bench warrant.
- § 140. Clerk to issue bench warrant when ordered.
- § 141. Court to order process when indictment found.
- § 142. Form of bench warrant.
- § 143. Indorsement as to bail.
- § 144. Officer other than sheriff arresting—how to proceed.
- § 145. Indictment for unbailable offense—proceedings.
- § 146. Summons on indictment—form.
- § 147. Issual and service of summons.
- § 148. Summons in misdemeanor cases only.
- § 149. Bench warrant—when may be issued.

§ 138 ^[139] **Process on indictment, writ of arrest or summons.** The process on an indictment consists of the writs for arresting or summoning the defendant to appear and answer the indictment.

§ 139 ^[142] **Process of arrest bench warrant.** The process of arrest on an indictment shall be a bench warrant. (*Form, sec. 142, and page 654.*)

§ 140 ^[140] **Clerk to issue bench warrant when ordered.** A bench warrant shall be issued by the clerk, upon the order of the court, and may be re-issued from time to time by order of the attorney for the Commonwealth.

§ 141 ^[141] **Court to order process on finding of indictment.** Upon an indictment being found, if the defendant be not in custody, nor on bail, the court shall forthwith make an order for process to be issued thereon, designating whether it shall be for arresting or summoning the defendant; and if for arresting the defendant, and the offense charged be bailable, the sum in which he may be admitted to bail shall be fixed. If he be on bail the court may order a bench warrant to issue, or commit him to custody, and fix the amount of bail to be given by him. (*Forms of orders, page 671.*)

tended to apply to party actually committing crime. *Com. v. Carter*, 94 Ky. 527, overruling *Stamper v. Com.*, 7 Bush 612.

(13) Although an offense is not charged in the precise words used in the statute in defining it, if it is alleged in words conveying the same meaning it will be sufficient. *Taylor v. Com.*, 3 Bush 508; *Moore v. Com.*, 92 Ky. 630.

§ 140. **Process—court must order.** The clerk has no authority to issue process for the arrest of a person who has been indicted without an order directing it to issue, and process issued by the clerk without order confers no authority upon the sheriff to arrest the defendant, or take bail. *Shaw v. Com.*, 1 Duv. 1.

§ 142 ^[142] **Bench warrant—form of.** A bench warrant may be substantially of the following form :

FRANKLIN CIRCUIT COURT.

The Commonwealth of Kentucky, to any sheriff, coroner, jailer, constable, marshal or policeman in this State: You are hereby commanded forthwith to arrest A B, and bring him before the Franklin Circuit Court to answer to an indictment found in that court against him for felony [or misdemeanor, as the case may be], or, if the court be adjourned for the term, that you deliver him to the custody of the jailer of Franklin county. Given under my hand, this — day of —, 1853.

P. SWIGERT, *Clerk F. C. C.*

§ 143 ^[143] **Indorsement as to bail.** If the offense be bailable, an indorsement shall be made on the bench warrant substantially as follows:

“The defendant is to be admitted to bail in the sum of — dollars, and if he desire to give bail, it may be taken by a sheriff of the county in which he is arrested, or the sheriff of Franklin county.” (*Bail may be sworn, qualifications of, secs. 76, 77; what peace officers may take bail, sec. 84.*)

§ 144 ^[144] **Officer other than sheriff arresting—how to proceed.** If the bench warrant be executed by any other officer than a sheriff, such officer, at the defendant's request, shall take him before a sheriff of the county in which he is arrested, or of the county in which the indictment was found, for the purpose of giving bail.

§ 145 ^[145] **Indictment for unbailable offense—how to proceed.** If the defendant be on bail, and the indictment be for an offense not bailable, and he appear in pursuance of the bail bond, he shall be forthwith committed to jail; and if he do not appear, on being required by the court, the bail bond shall be forfeited, and a bench warrant issued for his arrest.

§ 146 ^[146] **Summons on indictment—form of.** The summons on an indictment may be substantially of the following form :

FRANKLIN CIRCUIT COURT.

The Commonwealth of Kentucky, to any sheriff, coroner, jailer, constable, marshal or policeman in this State: You are hereby commanded to summon A B to appear in the Franklin Circuit Court, on the first day of its next June term, to answer an indictment for misdemeanor found against him in that court. Given under my hand, this — of —, 1853.

P. SWIGERT, *Clerk F. C. C.*

§ 147 ^[148] **Issual and service of summons.** The summons shall be issued and served in the same manner as a summons in civil actions. (*Provisions of Civil Code concerning, secs. 40 to 56.*)

§ 148 ^[149] **Summons in misdemeanor cases only.** The summons shall only be issued on indictments for misdemeanor, if the court have not ordered a bench warrant to issue, and may be issued without any order by the court.

§ 149 ^[150] **Bench warrant—when may be issued.** The court may, at its discretion, order a bench warrant to be issued on any indictment; but if the punishment be limited to a fine of one hundred dollars or less, a bench warrant shall not be issued, unless the court be satisfied that there is reason to believe the defendant will escape punishment if a bench warrant be not issued.

CHAPTER IV.

PRODUCTION OF EVIDENCE.

§ 150. Subpœnas to be issued on request.

§ 151. Witnesses' attendance—how secured.

§ 152. Subpœna *duces tecum* may be issued.

§ 153. Depositions for defendant—when and how taken.

§ 150 ^[151] **Subpœnas to be issued on request.** The clerk of the court, upon the request of the Commonwealth's Attorney, or of the defendant, or his attorney, shall issue subpœnas for witnesses. (*Form of, page 655.*)

§ 151 ^[152] **Witnesses' attendance—how secured.** The provisions of the Code of Practice in civil actions shall apply to and govern the summoning and coercing the attendance of witnesses, and compelling them to testify in all prosecutions, criminal or penal actions or proceedings, except that the attendance of witnesses residing in any part of the State may be coerced, and it shall never be necessary to tender to the witnesses any compensation for expenses, or otherwise, before process of contempt shall issue. (*Provisions of Civil Code referred to, secs. 532 to 542; form of warrant of arrest for witness, page 655; non-resident witness for Commonwealth, fees of, Ky. Stat., sec. 368; fees generally, Ky. Stat., sec. 367; special bailiff to summon witness, Ky. Stat., sec. 1142.*)

§ 152 ^[153] **Subpœna *duces tecum* may be issued.** The court on motion of either party may, by its order and process, compel the production of any written document, or of any other thing which may be necessary

or proper to be produced or exhibited as evidence on the trial, and may punish a disobedience of its orders or process, as in cases of witnesses refusing to testify. (*Form of subpoena duces tecum*, page 655.)

§ 153 ⁽¹⁸⁴⁾ **Depositions for defendant, when and how taken.** If it appear by affidavit that a material witness is about to leave this State without the procurement or consent of the defendant, or is physically unable to attend for examination in court; or that his death is apprehended; "or that he is a non-resident of this State, and beyond the reach of the process of the court," the court or the judge, "or any circuit judge" in vacation, may authorize the defendant to take his deposition. The court or judge shall, by written order, prescribe the manner of taking the deposition, whether by written interrogatories, or upon notice to the attorney for the Commonwealth; and such deposition shall only be used if the witness be dead or is absent from the State, or physically unable to attend for examination in court at the time of trial. The deposition may be taken by any officer who is authorized to take depositions by the Civil Code: *Provided*, That the deposition of a non-resident shall only be taken upon interrogatories to be filed with the clerk of the court in which the trial is pending, and under the same rules that are prescribed in the Civil Code for taking depositions in civil cases; and notice of the filing of the interrogatories shall at once be given to the attorney for the Commonwealth, who may file cross-interrogatories within ten days after the notice of the filing of the interrogatories shall have been given him; and thereupon it shall be the duty of the clerk to issue commissions, with the copies of the interrogatories and cross-interrogatories, if any, annexed in the same manner and to the same persons as is prescribed by section five hundred and seventy-seven of the Civil Code, and said deposition shall be taken in all respects as is prescribed by the Civil Code in taking depositions in civil cases. (*Sec. as amended by act of 1893.*)

§ 153. (1) **Depositions** can not be used by the defendant in any state of case not provided for by statute. *Kaelin v. Com.*, 84 Ky. 355; nor can the State take depositions and read them against the accused because he is entitled to be confronted with the witnesses against him. 84 Ky. 355.

(2) The accused may waive the presence of his own witnesses and allow a statement as embodied in an affidavit to be read as evidence, and he will be bound by his consent to this course. *Taylor v. Com.*, 9 R. 316; *Nichols v. Com.*, 11 Bush 575; and see further, as to continuance, sec. 189 and notes.

CHAPTER V.

ARRAIGNMENT AND PLEADINGS BY THE DEFENDANT.*

- § 154. Arraignment defined.
- § 155. Arraignment may be dispensed with.
- § 156. Trial of sanity of accused—proceedings if insane.
- § 157. Plea or motion by defendant when arraigned.
- § 158. Grounds for setting aside indictment.
- § 159. Proceedings when indictment set aside.
- § 160. Defendant discharged unless new one found.
- § 161. Motion overruled, defendant must plead.
- § 162. Pleadings allowed.
- § 163. Pleading may be oral, but entry made of.
- § 164. Form of entry of demurrer or plea.
- § 165. Demurrer when proper.
- § 166. Demurrer for want of jurisdiction—proceedings.
- § 167. Want of jurisdiction appearing on trial—proceedings.
- § 168. Misjoinder of offenses—dismissal of one.
- § 169. Judgment on demurrer when final.
- § 170. Practice if demurrer sustained on certain grounds.
- § 171. Demurrer overruled, defendant may plead.
- § 172. Pleas that may be entered.
- § 173. Plea of guilty must be by defendant in person.
- § 174. Plea of guilty may be withdrawn before judgment.
- § 175. Effect of plea of not guilty.
- § 176. Acquittal on verdict, or conviction, a bar.
- § 177. Acquittal or conviction bars all degrees of offense.
- § 178. Dismissal that does not operate as a bar.
- § 179. Written pleadings not necessary—practice.

§ 154 [155] **Arraignment defined.** An arraignment is the reading of the indictment by the clerk, to the defendant, and asking him if he pleads

* **Consent of defendant—waiver of error by.** In *Com. v. Adam's*, 92 Ky. 134, the court held that the consent of the accused that the judge might change the charge in the indictment did not bind him; in *Kennedy v. Com.*, 78 Ky. 447, an agreement of the accused as to a special judge was held binding upon him, the court holding that there was "a broad distinction between an admission of a fact necessary to put the machinery of the law in motion to the end that a trial might be had and the consent of one charged with felony to be tried by less than twelve jurors or that one not legally qualified should preside as judge. In *Murphy v. Com.*, 1 Met. 365, it was held that a defendant on trial for a misde-

meanor may consent to be tried by a less number than the regular jury; and in *Taylor v. Com.*, 9 R. 316, the accused who consented that an affidavit of his witness should be read as evidence in his behalf was held bound by it; and the consent of accused that jury may be discharged estops him from pleading former jeopardy. *Robinson v. Com.*, 88 Ky. 386; consent that a change of venue may be had is binding. *Lightfoot v. Com.*, 80 Ky. 516.

§ 154. (1) **Arraignment.** Does the defendant's silence or failure to plead amount to a confession of guilt? The court suggests that where the defendant refuses to file any plea, the safer rule is to have the plea of not guilty entered

guilty, or not guilty, to the indictment. (*Reading indictment and stating plea, sec. 219.*)

§ 155 [200] **Arraignment may be dispensed with.** The arraignment shall only be made on indictments for felony, and may be dispensed with by the court, with the defendant's consent.

§ 156 [207] **Trial of sanity of defendant—proceedings if insane.** If the court shall be of opinion that there are reasonable grounds to believe that the defendant is insane, all proceedings in the trial shall be postponed until a jury be impaneled to inquire whether the defendant is of unsound mind, and if the jury find that he is of unsound mind, the court shall direct that he be kept in prison or conveyed by the sheriff to the nearest lunatic asylum, and there kept in custody by the officers thereof until he be restored, when he shall be returned to the sheriff on demand, to be reconveyed by him to the jail of the county. (*Verdict and proceedings on plea of insanity, sec. 268.*)

§ 157 [208] **Plea or motion by defendant when arraigned.** Upon the arraignment, or upon the call of the indictment for trial, if there be no

and counsel assigned. *Triplett v. Com.*, 84 Ky. 193.

(2) Where the bill of exceptions shows that an arraignment was waived, and that the defendant pleaded not guilty, the objection that there was no arraignment supported by the defendant's affidavit can not avail, as the record is conclusive of that fact and prevents any inquiry into its correctness. *Farris v. Com.*, 14 Bush 362.

(3) The court in a felony case may defer calling on the defendant to plead to the indictment until the jury is selected, and then after his plea is entered the jury may be sworn. *Disney v. Com.*, 9 R. 413; and see sec. 217.

(4) Where the trial has commenced by the examination of a witness and it is then discovered that defendant has not been arraigned or entered any plea the court may, upon the refusal of the accused to then enter his plea or consent that the jury may be discharged, discharge on its own motion the jury, arraign the defendant, reswear the jury and proceed with the trial. *Disney v. Com.*, 9 R. 413; *Minor v. Com.*, 5 R. 176; and see *Galloway v. Com.*, 5 R. 213.

(5) The requirement that the indictment shall be read and the plea of defendant stated to jury is mandatory

and no party can be convicted unless it is substantially complied with. *Galloway v. Com.*, 5 R. 213; but in *Meece v. Com.*, 78 Ky. 586, the record failed to show that any plea was entered, but judgment was not reversed.

(6) See further, sec. 219 and notes thereto.

§ 156. **Insanity.** The Court of Appeals has no authority to direct an inquiry as to whether the defendant has not become insane since the rendition of the verdict. *Brown v. Com.*, 14 Bush 398.

§ 157. (1) **Misdemeanor — judgment by default.** Upon an indictment for misdemeanor a judgment may be rendered against the defendant by default. *Com. v. Cheek*, 1 Duv. 26.

(2) Upon an indictment for misdemeanor the defendant may be tried in his absence, and may, by counsel, put in any plea save that of guilty. His plea may be put in and defense conducted in his absence, and this right can not be taken from him by requiring bail. *Johnson v. Com.*, 1 Duv. 244; and see sec. 184 and notes.

(3) **Waiver.** The right to set aside an indictment is waived if not made at the proper time, and when an indictment for misdemeanor is called for trial, if the defendant fails to move to set it aside or

arraignment, the defendant must either move to set aside the indictment or plead thereto.

§ 158 [159] **Grounds for setting aside indictment.** The motion to set aside the indictment can only be made on the following grounds:

1. A substantial error in the summoning or formation of the grand jury.
2. That some person, other than the grand jurors, was present before the grand jury when they acted upon the indictment.
3. That the indictment was not found and presented as required

plead to it, he loses his opportunity to plead as a matter of right and should thereafter be refused leave to plead any other than a meritorious plea in bar. *Com. v. Smith*, 10 Bush 476.

(4) **Court has no power to change charge in an indictment**, even by consent of the accused. *Com. v. Adams*, 92 Ky. 134.

§ 158. (1) **Error in formation of grand jury.** Objection to an indictment because one of the grand jurors was not a housekeeper comes too late at the second term after the defendant is before the court. *Com. v. Smith*, 10 Bush 476; *Haggard v. Com.*, 79 Ky. 366; *Com. v. Prichett*, 11 Bush 277.

(2) A white person indicted by a grand jury composed wholly of persons of the white race can not complain because negroes were excluded by statute from the jury. *Com. v. Wright*, 79 Ky. 22. The statute declaring that only white persons were competent as jurors was declared unconstitutional in *Com. v. Johnson*, 78 Ky. 509.

(3) Jury commissioners or sheriff, when he acts in their stead, are not bound to select negro jurors; the only right the accused can claim is that no citizen otherwise competent shall be excluded by law on account of race or color. *Haggard v. Com.*, 79 Ky. 366.

(4) The failure of any member of the grand jury to possess each of the qualifications prescribed by the statute, viz.: being a housekeeper, citizen and over twenty-one years of age, is cause for setting aside indictments found by such jury. A grand juror is a competent witness on a motion to set aside an indictment to prove that he was not a citizen when he sat on the jury that

found the indictment. *Ragantall v. Com.*, 14 Bush 457; *Com. v. Smith*, 10 Bush 476.

(5) "It is a well-settled principle and one which is applicable to the action of all juries that the testimony of the jurors is not competent to explain the grounds of their decision or impeach the validity of their finding." *Com. v. Skeggs*, 3 Bush 19.

(6) That a member of a grand jury was a school trustee when the indictment was found is no ground for setting it aside. The provision of the statute that no "civil officer" shall be competent does not make the taking of a civil officer on the grand jury a substantial error in its formation. *Com. v. Prichett*, 11 Bush 277; *Com. v. Rudd*, 3 R. 328; nor is it ground for quashing an indictment that one of the grand jurors that found it was the owner of a grist mill. *Slagel v. Com.*, 81 Ky. 485.

(7) It did not appear in the order of court that the grand jury was sworn, or that one of their number was appointed foreman; but, in the absence of proof to the contrary, the court will presume that these requirements were complied with. *Com. v. Pullan*, 3 Bush 47.

(8) **Evidence before grand jury.** Court has no power to set aside indictment because incompetent evidence was heard by. *Com. v. Minor*, 89 Ky. 555.

(9) **Foreman—oath to jury.** Ky. Stat., sec. 2250; oath to witnesses, see sec. 106 of Code.

(10) **Presentment of indictment.** An indictment for grand larceny, committed by stealing sheep, was indorsed on the back, and described in the order of court filing it as an indictment for "sheep stealing." Held sufficient identification.

by this Code. (*Decisions of court upon motion to set aside indictment are not subject to exception, sec. 281.*)

§ 159 ^[100] **Proceedings when indictment set aside.** If the motion be sustained, the court shall make an order that the case be submitted to another grand jury, to be assembled at that or the next term of the court, and the defendant, if in custody, shall be remanded to jail, or if on bail, the bail shall be liable for the defendant's appearance to answer a new indictment, if one be found. (*See further, as to reference to grand jury, secs. 116, 117; dismissal when not a bar, sec. 178.*)

§ 160 ^[101] **Defendant discharged unless new one be found.** Unless, however, a new indictment be found before the final discharge of the next grand jury, the defendant shall be discharged from custody, or bail, unless for good cause shown the court shall otherwise order. (*See further, secs. 116, 117.*)

§ 161 ^[102] **Motion overruled, defendant must plead.** If the motion be overruled, the defendant shall be required to plead to the indictment.

§ 162 ^[103] **Pleadings allowed.** The only pleading on the part of the defendant is a demurrer or a plea.

§ 163 ^[104] **Pleadings may be oral—entry of record.** The demurrer and plea must be entered in open court, and may be oral, but an entry thereof must be made on the record.

§ 164 ^[170] **Form of entry of demurrer and plea.** The entry on the record of the demurrer and pleas may be substantially in the following form:

1. A demurrer: "The defendant demurs to the indictment."
2. A plea of guilty: "The defendant pleads that he is guilty of the offense charged in the indictment."

Com. v. English, 6 Bush 431; see secs. 118, 121.

(11) **Qualifications of grand jurors.** Incompetent person serving no cause for setting indictment aside. Ky. Stat., sec. 2248.

(12) See further, secs. 118, 121 and notes thereto.

§ 159. (1) **Failure to dispose of former indictment.** A person was indicted for murder; after the expiration of several years a new indictment was found for same offense under which he was tried; the court held that his substantial rights were not prejudiced, although no order was made disposing of first indictment. Blyew v. Com., 91 Ky. 200.

(2) **Re-indictment—power of grand jury.** Under an indictment for felony an order

was entered by Commonwealth's attorney that accused would only be held for a misdemeanor; at next term indictment was dismissed, and case re-referred to grand jury, which again found an indictment for felony. Held that grand jury had a right to say what offense defendant was guilty of, notwithstanding opinion of attorney, and that failure to set aside the order made did not affect the question. King v. Com., 15 R. 247.

(3) An indictment on motion of accused was set aside and case resubmitted to jury, defendant being allowed to stand on his bond; failing to appear to other indictment found against him, his bail was held liable. Brewer v. Com., 8 Bush 550.

§ 160. See note to sec. 117.

3. A plea of not guilty: "The defendant pleads that he is not guilty of the offense charged in the indictment."

4. A plea of former acquittal, or conviction: "The defendant pleads that he has been acquitted [or convicted, as the case may be] of the offense charged in the indictment, by the judgment of — court [naming it], rendered on the — day of — [naming the time]."

§ 165 ^[165] **Demurrer when proper.** A demurrer is proper—

1. If it appear from the indictment that the offense was not committed within the local jurisdiction of the court.

2. If the indictment do not substantially conform to the requirements of article two of chapter two, of title six.

3. If more than one offense be charged in the indictment, except as provided in section one hundred and twenty-seven.

4. If the facts stated do not constitute a public offense.

5. If the indictment contain matter which is a legal defense or bar to the prosecution. (*Sustaining demurrer when a bar, sec. 169; when not, sec. 178.*)

§ 166 ^[166] **Demurrer for want of jurisdiction—proceedings.** If the demurrer be sustained, on account of its appearing that the offense was not committed within the jurisdiction of the court, and it appear that the offense is a felony, and was committed in the jurisdiction of another

§ 165. (1) **Demurrer.** A demurrer admits the facts charged, but only to test the law on such facts; and if it be overruled, the admission is no longer binding. *Com. v. Jones*, 10 Bush 725.

(2) If the indictment charges two offenses, except as allowed in sec. 127, a demurrer should be sustained, unless one of them is dismissed, as provided in sec. 168. *Nichols v. Com.*, 78 Ky. 180; *Ellis v. Com.*, 78 Ky. 130.

(3) A demurrer is the proper mode of objecting to an indictment upon the ground that it charges two offenses. *Johnson v. Com.*, 90 Ky. 488.

(4) "There is no provision in the Criminal Code which forbids the filing of a demurrer after a plea of not guilty, or after the jury is sworn and before the trial." *Ellis v. Com.*, 78 Ky. 130.

(5) If a conspiracy be charged against two or more persons for the same offense, that does not render the indictment obnoxious to subsection 3, of this section.

This section must be construed with sec. 234, which authorizes a conspiracy to be charged against two or more persons jointly indicted for the same offense. *Salisbury v. Com.*, 79 Ky. 425.

(6) The court will assume on demurrer that the offense was committed at the time charged in the indictment. *Com. v. Cain*, 14 Bush 525.

(7) **Effect of demurrer.** Secs. 169, 170, 178 and notes.

(8) **Joinder of offenses—one offense.** See notes to secs. 126, 127.

(9) **Repeal of law—effect of.** Although the law under which an offense was committed has been repealed, the offender may still be convicted, provided there is nothing in the repealing statute which impairs the force of sec. 23, chap. 21, Gen. Stat. [now sec. 465, Ky. Stat.]. This statute and the repealing act must be construed together. *Waddell v. Com.*, 84 Ky. 276; *Com. v. Sherman*, 85 Ky. 686; *Com. v. Duff*, 87 Ky. 586.

court of this State, the court shall make an order that the clerk transmit to the clerk of the court having jurisdiction of the offense, a copy of the indictment, and all the original papers, including the bail bond, if any there be; and if the defendant be in custody, that he be carried and delivered, with a copy of the order, to the jailer of the county to which the papers are directed to be transmitted; and said order, and the proceedings in obedience thereto, shall operate in all respects as an order of a magistrate holding a defendant to answer the charge, according to title four; and the bail, if any, shall be liable for the appearance of the defendant, to answer an indictment, in the court to which the papers are transmitted, and shall have the right of surrendering the defendant to the jailer of that county, or to that court. (*See further as to practice when want of jurisdiction appears, sec. 230.*)

§ 167 [167] **Want of jurisdiction appearing on trial—proceedings.** The same orders may be made, and proceedings had, whenever it appears on the trial, by proof, that the offense, being a felony, was committed out of the jurisdiction of the court in which the indictment was found, but within the jurisdiction of another court of this State. (*See further as to practice, secs. 166, 230.*)

§ 168 [168] **Misjoinder of offenses — dismissal of one.** If the indictment improperly charge more than one offense, the attorney for the Commonwealth may dismiss one of them, and thereupon the demurrer shall not be sustained on that ground. (*What offenses may be joined, sec. 127.*)

§ 169 [169] **Judgment on demurrer—when final.** If the demurrer be sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final, and the defendant shall be discharged from any further prosecution for the offense. (*Dismissal when not a bar, sec. 178; when judgment of acquittal not to be reversed, sec. 339.*)

§ 170 [170] **Practice if demurrer sustained on certain grounds.** If the demurrer be sustained on any other grounds than those mentioned in the last four sections, the case may be submitted to another grand jury, and an order to that effect may be made by the court on the record,

§ 168. **Misjoinder—practice.** If there is a misjoinder and attorney does not dismiss one of the offenses, demurrer should be sustained. *Ellis v. Com.*, 78 Ky. 130.

§ 169. **Demurrer—bar.** An erroneous judgment for the defendant sustaining a demurrer to an indictment, upon the

ground that it contains a misjoinder of offenses, does not operate as a bar to a future prosecution, and may be reversed by the Court of Appeals. *Com. v. Anthony*, 2 Met. 390; it is the indictment and not the opinion of the lower court that must determine whether the judg-

whereupon the defendant shall be held in custody, or on bail, in the manner and for the time provided in sections one hundred and fifty-nine and one hundred and sixty. (*Dismissal of indictment not a bar, sec. 178.*)

§ 171 [171] **Demurrer overruled, defendant may plead.** If the demurrer be overruled, the defendant has a right to plead to the indictment; if he fail to do so, final judgment shall be entered against him, and, if necessary, a jury impaneled to fix the punishment.

§ 172 [172] **Pleas that may be entered.** There are but three kinds of pleas to an indictment—

1. A plea of guilty.

2. Not guilty.

3. A former conviction or acquittal of the offense charged, either of which may be pleaded with or without the plea of not guilty. (*Form of pleas, sec. 164, and page 671.*)

§ 173 [173] **Plea of guilty must be by defendant in person.** The plea of guilty can only be entered by the defendant himself in open court.

§ 174 [174] **Plea of guilty may be withdrawn.** At any time before judgment the court may permit the plea of guilty to be withdrawn, and a plea of not guilty substituted.

ment on demurrer shall operate as a bar. *Com. v. Cain*, 14 Bush 525, and see notes to sec. 178.

§ 172. (1) **Failure to plead.** Does the silence or failure of the accused to plead amount to a confession of guilt? The court say: "The safer rule would be, where the accused refused to file any plea, to have the plea of not guilty entered and counsel assigned; but when he does plead, no confession, except that of confession of guilt in open court by the accused in person, will authorize a judgment of conviction." *Triplett v. Com.*, 84 Ky. 193.

(2) **Pleas that may be entered—evidence.** There are but three kinds of pleas that can be entered: First, guilty; second, not guilty; and third, former conviction or acquittal; and the court may refuse to allow any other plea to be entered. Although there may be a plea of guilty, the Commonwealth to increase, or the defendant to mitigate, the punishment has the right to place the facts before the jury. *Cornelison v. Com.*, 84 Ky. 583; and requirement that indictment

shall be read as provided in sec. 219, and plea entered is mandatory. *Galloway v. Com.*, 5 R. 213.

(3) **Plea not entered.** Although the orders fail to show that a plea of not guilty was entered, when the instructions show what the issue was, it is too late to raise the question in the Court of Appeals that no plea was entered or issue made. *Meece v. Com.*, 78 Ky. 586.

(4) **Traverse not necessary.** A plea of former acquittal or conviction need not be traversed by the Commonwealth. The burden is on the accused to show that he has been acquitted or convicted of the identical offense for which he is being tried. *Vowels v. Com.*, 83 Ky. 193.

(5) **Trial in absence of accused.** On an indictment for misdemeanor the defendant may be tried in his absence, and may by counsel put in any plea save that of guilty. *Johnson v. Com.*, 1 Duv. 244; *Com. v. Neat*, 89 Ky. 241.

§ 173. See notes to sec. 174.

§ 174. (1) **Plea of guilty may be withdrawn even after verdict,** a new trial be-

§ 175 (175) **Effect of plea of not guilty.** The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact tending to establish a defense, other than a former conviction or acquittal, may be given in evidence under it.

§ 176 (176) **Acquittal on verdict, or conviction a bar.** An acquittal by a judgment upon a verdict, or a conviction, shall bar another prosecu-

ing granted for that purpose, if it appear that defendant was induced to enter the plea by the threats or promises of the court or attorney for the Commonwealth and thereby overreached or deceived. *Mounts v. Com.*, 89 Ky. 274.

(2) **Plea of guilty—evidence.** A plea of guilty does not deprive the Commonwealth of the right to introduce evidence bearing upon the question of punishment where the offense charged is of different degrees, or is punishable in the discretion of the jury, unless such plea has been entered upon the faith of promises by the court or Commonwealth Attorney that the minimum punishment will be inflicted. *Mounts v. Com.*, 89 Ky. 275; *Cornelison v. Com.*, 84 Ky. 583.

§ 75. **Plea of not guilty.** "The plea of not guilty puts in issue every fact necessary for the Commonwealth to establish in order to a conviction, and as to all these facts or issues the burden of establishing them by proof that excludes a reasonable doubt remains with the Commonwealth; but when the accused relies upon some separate matter of defense not embraced in those issues, the burden of proof to establish such matter is on the accused." *Ball v. Com.*, 81 Ky. 662.

§ 176. (1) **Application of rule.** The law as to former jeopardy extends to all felonies and to all cases where the punishment inflicted is infamous. *Williams v. Com.*, 78 Ky. 93; 88 Ky. 386.

(2) **Arrest of judgment.** Where judgment is arrested or reversed because of error in not sustaining motion in arrest of judgment, defendant may be tried under a new indictment. Sec. 279; *Cornelius v. Com.*, 3 Met. 481; *White v. Com.*, 9 Bush 178.

(3) **Breach of the peace—bars what?** A conviction for a breach of the peace is a bar to a subsequent indictment for malicious wounding for the same act. *Com.*

v. Bright, 78 Ky. 238. And a fine for a breach of the peace is a bar to an indictment for assault and battery for the same offense. *Com. v. Foster*, 3 Met. 1.

(4) **Consent of accused** to discharge of jury waives any objection to being tried again, and his consent may appear by implication as well as by express words, but his silence will not be construed into consent. *Robinson v. Com.*, 88 Ky. 386.

(5) **Definition of former jeopardy.** "A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon indictment or information which is sufficient in form and substance to sustain a conviction and a jury has been charged with his deliverance; and a jury is said to be thus charged when they have been impeached and sworn." *Williams v. Com.*, 78 Ky. 93.

(6) **Degrees of offense.** Conviction or acquittal of any degree bar to prosecution for any other degree. Sec. 177; *Com. v. Bright*, 78 Ky. 238.

(7) **Discharge of jury after defendant has been put upon trial**, save in case of necessity or by his consent, operates as an acquittal and bars a retrial. *Robinson v. Com.*, 88 Ky. 386; *Williams v. Com.*, 78 Ky. 93.

(8) Cases authorizing discharge of jury, 88 Ky. 386, secs. 250, 251. Sections 243, 252, in so far as they authorize the dismissal of the indictment and discharge of the jury in all cases and say it will not be a bar, are unconstitutional. *Williams v. Com.*, 78 Ky. 93.

(9) Discharge of jury and dismissal of indictment and resubmission to another grand jury is a bar to prosecution under second indictment if first indictment would have sustained a conviction. *Colliver v. Com.*, 90 Ky. 262; *Robinson v. Com.*, 88 Ky. 386; *Williams v. Com.*, 78 Ky. 93.

(10) Discharge of jury because of their

tion for the same offense, notwithstanding a defect in form or substance in the indictment on which the acquittal or conviction took place.

failure to agree does not operate as an acquittal or as a bar to another trial, although they are discharged in absence of accused. *Yarbrough v. Com.*, 89 Ky. 151.

(11) After the jury had been sworn, and while the evidence was being heard, one of the jurors announced that he was on the grand jury that found the indictment. The court, against the objection of the defendant, ordered the juror to be discharged and another selected, which was done. The defendant was convicted; on appeal the case was reversed, and on the second trial he pleaded in bar the discharge of the juror. Held that his plea should have been sustained. *O'Brian v. Com.*, 9 Bush 333, overruling *O'Brian v. Com.*, 6 Bush 563.

(12) **Election to prosecute for misdemeanor.** Re-reference to grand jury, before defendant has been put upon trial, is not a bar to prosecution under second indictment for felony, although order electing to prosecute under first indictment—which was also for a felony—for a misdemeanor was not set aside. *King v. Com.*, 15 R. 247.

(13) **Larceny of several articles at same time.** By the same act, and with the same intent, F took a horse, wagon and harness, the property of H. Two indictments were found against F, one for stealing the horse, the other for stealing the wagon and harness. On the trial for stealing the horse F pleaded not guilty and was acquitted. This acquittal was a good plea in bar to the indictment for stealing the wagon and harness. *Fisher v. Com.*, 1 Bush 211; see *Nichols v. Com.*, 78 Ky. 180; *Williams v. Com.*, 78 Ky. 93; but where a person presents a pistol at two persons and compels both to surrender their property at once he is guilty of two offenses. *Keeton v. Com.*, 92 Ky. 522.

(14) **Larceny — misnomer of owner of property.** The defendant was charged in one count of the indictment with grand larceny and in another with receiving stolen goods. He pleaded not guilty, and

after the evidence was heard the indictment, on motion of the Commonwealth's attorney, was dismissed. Afterward another indictment was found similar to the one dismissed, except that it charged that the stolen property was *owned* by A and B, while the first stated that it was owned by B. To this indictment the defendant's plea of former acquittal should have been sustained. *Williams v. Com.*, 78 Ky. 93.

(15) **Mistrial — new indictment —** former indictment lost or defective—second prosecution not barred by first mistrial and discharge of jury. *Thompson v. Com.*, 15 R. 838.

(16) **New trial places party in same position as if no trial had been had.** Sec. 270; *Com. v. Arnold*, 83 Ky. 1.

(17) He can not plead first trial in bar, and after new trial has been granted first indictment may be dismissed and new indictment found. *Wells v. Com.*, 9 R. 658; *Haskins v. Com.*, 8 R. 419; and see note 21.

(18) **Omission to arraign defendant—discharge of jury.** Where the jury is selected and sworn and some evidence introduced and it is then discovered that defendant has not been arraigned, the court may, upon refusal of defendant to act, discharge jury, arraign accused, re-swear jury and proceed with trial. *Disney v. Com.*, 9 R. 413; *Minor v. Com.*, 5 R. 176.

(19) **Pardon—effect of.** A pardon pending the prosecution, but before conviction, is a good plea in bar to the indictment. *Com. v. Bush*, 2 Duv. 264.

(20) One who has been convicted of a felony and pardoned by the Governor on a subsequent commission of the same offense may be convicted and sentenced for double the time as provided in sec. 12, art. 1, chap. 29, Gen. Stat. [now sec. 1130, Ky. Stat.]. *Mount v. Com.*, 2 Duv. 83.

(21) **Reversal upon defective indictment.** Accused can not plead former conviction to a trial under a new indictment.

§ 177 [177] **Acquittal or conviction bars all degrees of offense.** If an offense consist of different degrees, a conviction, or acquittal, by judgment upon a verdict, shall be a bar to another prosecution for the offense in any of its degrees. (*Degrees of offenses defined, sec. 263.*)

§ 178 [178] **Dismissal that does not operate as bar.** The dismissal of the indictment by the court, on demurrer, except as provided in section

Mount v. Com., 2 Duv. 93; White v. Com., 9 Bush 178; and where one has been convicted of manslaughter under a murder indictment, he may, upon reversal of case, be tried again for murder. Com. v. Arnold, 83 Ky. 1; and see note 17.

(22) **Surety of tavern-keeper.** The surety of a tavern-keeper is not concluded by a judgment against the tavern-keeper for a breach of his bond, but may contest his liability, and is entitled to ten days' notice and to a jury trial. Margooley v. Com., 3 Met. 406.

(23) **Trial begins when jury is sworn.** Willis v. Com., 85 Ky. 68; Tye v. Com., 3 R. 59.

(24) **Trial in quarterly court.** When a person has been indicted for a misdemeanor he may be tried by the quarterly court under the act of March 18, 1876 [Ky. Stat., sec. 1073]; but if he procures a trial under said act, not in good faith, but merely for the purpose of avoiding a trial in the circuit court, a judgment of acquittal in the quarterly court will not be a bar to a trial under the indictment in the circuit court. Carrington v. Com., 78 Ky. 83.

(25) **Trial under ordinance of a town** was held, in Kemper v. Com., 85 Ky. 219, not to bar a prosecution for same offense by the Commonwealth, but see now Constitution, sec. 168.

(26) **Trial in United States court.** A defendant can not be convicted in a State court for an offense after having been tried and convicted for the same offense in the United States court. Com. v. Overby, 80 Ky. 208; but if United States court had no jurisdiction of offense trial by it is not bar. Blyew v. Com., 91 Ky. 200.

(27) **Two indictments—when one barred.** Two indictments were found at same time against a railroad company for nuisance in obstructing a road; on the trial of the

second the company pleaded its acquittal under the first as a bar. The court held that the first trial was only a bar as to such offenses as were then attempted to be proved, and that whether acts and time was covered by first trial was a question of fact upon which evidence might be introduced. C. & O. R. R. v. Com., 88 Ky. 368.

(28) The State has the right in the trial of certain offenses to single out and rely upon certain acts, and when it confines itself to particular acts the trial is not a bar to other prosecutions for the same offense committed at other times within the year, but if the State on the first trial attempts to embrace or cover the entire period, then the first trial is a bar to a second prosecution for the same offense committed within the period. 88 Ky. 368.

(29) Commonwealth is not confined to time named in indictment, but may select and rely upon an offense committed at any time within year. 88 Ky. 368; see sec. 129 and notes.

§ 177. **Conviction or acquittal for any degree a bar to prosecution for any other degree.** Com. v. Bright, 78 Ky. 238; Com. v. Hawkins, 11 Bush 603.

§ 178. (1) **Dismissal of indictment—when bar.** See note 9 to sec. 176.

(2) An order of court abating an indictment, although superinduced by the mistaken belief that defendant was dead, was a termination of prosecution under that indictment, and it could not be reinstated on docket as a pending prosecution against the defendant. Henry v. Com., 4 Bush 427.

(3) Attorney for Commonwealth must file written statement of grounds of dismissal. Ky. Stat., sec. 123; but this section does not apply when indictment is dismissed to be resubmitted to grand jury. 88 Ky. 550.

one hundred and sixty-nine, or for an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense. (*But see note to sec. 243 as to when dismissal is bar.*)

§ 179 [180] **Written pleadings not necessary—practice.** Neither a joinder in demurrer, nor a reply to the plea of former acquittal or conviction, shall be necessary; but the demurrer shall be heard and decided, and the plea shall be considered as controverted by denial, and by any matter of avoidance that may be shown in evidence.

CHAPTER VI.

TRIAL.

- ARTICLE 1. MODE OF TRIAL, 180.
 2. TIME OF TRIAL, 185.
 3. POSTPONEMENT OF THE TRIAL, 188.
 4. THE JURY, 190.
 5. CONDUCT OF THE JURY TRIAL, 217.
 6. VERDICT, 255.

ARTICLE 1.

MODE OF TRIAL.

- § 180. Issues—how tried—jury trial.
 § 181. Issue of law.
 § 182. Issue of fact.
 § 183. Defendant on trial for felony to be present—bail.
 § 184. Trial of misdemeanor in absence of accused.

§ 180 [181] **Issues—how tried—jury trial.** Issues of law shall be tried by the court. Issues of fact, in prosecution for offenses of which the punishment is limited to a fine of sixteen dollars, shall be tried by the court. All other issues of fact shall be tried by a jury.

§ 181 [182] **Issue of law.** An issue of law arises on a demurrer to the indictment.

§ 182 [183] **Issue of fact.** An issue of fact arises upon a plea of not guilty, or of former acquittal, or conviction.

§ 183 [184] **Defendant on trial for felony must be present—bail.** If the indictment be for a felony, the defendant must be present, and shall

§ 183. (1) **Accused to be present during trial for felony.** "One charged with the commission of a felony can not be tried during his absence from the courtroom, and when any step is taken during the trial in the absence of the pris-

remain in actual custody during the trial; unless his bail appear personally in court, and consent that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury. If he escape from custody after the trial has commenced, the trial may either be stopped, or progress to a verdict, at the discretion of the Commonwealth's attorney; but judgment shall not be rendered until the presence of the defendant is obtained. (*Felony defined, sec. 6. See further, secs. 229, 285.*)

§ 184 (188) **Trial of misdemeanor in absence of accused.** If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant; or, if present, he may remain on bail during the trial. (*Misdemeanor defined, sec. 7.*)

oner the record must show affirmatively that he could in nowise have been prejudiced by it." *Meece v. Com.*, 78 Ky. 586; *Rutherford v. Com.*, 78 Ky. 639; 89 Ky. 151; 86 Ky. 642.

(2) **Bail during trial—accused entitled to.** During the trial of a felony when the bail is sufficient and agrees to stand on the bond, the accused is entitled to remain on bail until case is finally submitted to the jury, and where it appears that the personal liberty of the accused is necessary to the preparation of his case, the refusal to allow him to remain on bail will be a reversible error. *White v. Com.*, 80 Ky. 480.

(3) **Discharge of jury for failure to agree,** in absence of accused, does not prejudice his substantial rights. *Yarbrough v. Com.*, 89 Ky. 151; nor does failure to discharge upon request of jury. *McClernand v. Com.*, 11 R. 301.

(4) **Instructing jury** in absence of accused is error. *Meece v. Com.*, 78 Ky. 586; *McClernand v. Com.*, 11 R. 301.

(5) **Occasional absence from court-room** on account of temporary illness for a few minutes at a time, the trial continuing in the absence, did not prejudice the sub-

stantial rights of the accused. *Hite v. Com.*, 14 R. 308.

(6) **Receiving verdict** in absence of accused is error. *Temple v. Com.*, 14 Bush 769.

(7) **Submission of case to jury** in absence of accused is error. *Allen v. Com.*, 86 Ky. 642; *Brewer v. Com.*, 10 R. 122; but it is not necessary that accused should be present every time after first submission when jury retire to their room. *Richey v. Com.*, 10 R. 181.

(8) **Trial for felony begins** when jury is sworn, and after trial has begun the defendant is in the custody of the court and the bail not responsible unless they consent in open court that he may remain on bail. *Willis v. Com.*, 85 Ky. 68; *Tye v. Com.*, 3 R. 59.

§ 184. (1) **Accused may be absent during trial for misdemeanor.** *Com. v. Cheek*, 1 Duv. 62; *Johnson v. Com.*, 1 Duv. 244; and see notes to sec. 157.

(2) **Judgment by default** may be rendered in misdemeanor case; and, if necessary, a jury impaneled to fix the punishment. Sec. 171; *Com. v. Neat*, 89 Ky. 241; jury must fix penalty. Ky. Stat., sec. 1136, and sec. 258 of Code.

ARTICLE 2.

TIME OF TRIAL.

§ 185. Trial at term indictment found.

§ 186. Docketing prosecutions, setting for trial.

§ 187. Time prosecutions stand for trial.

§ 185 ^[186] **Trial at term indictment found.** If the defendant be in custody, or on bail, when the indictment is found, the trial may take place at the same term of the court, at a time to be fixed by the court.

§ 186 ^[187] **Docketing prosecutions, setting for trial.** All criminal prosecutions and penal actions not tried at any term of a court shall be docketed by the clerk for the next term, beginning with the first day thereof and setting them for as many days as may be necessary, in the same manner as ordinary civil actions are docketed. But the court may direct the number of days for which such prosecutions and actions shall be docketed; and may order any cause to be set for trial at a time specified in the order.

§ 187 ^[188] **Time prosecutions stand for trial.** All prosecutions shall stand for trial on the day to which they are docketed, if the defendant be in custody, or on bail, or have been summoned three days before the commencement of the term.

ARTICLE 3.

POSTPONEMENT OF TRIAL.

§ 188. Trial may be postponed for cause.

§ 189. Civil Code regulates postponement, with exceptions—affidavit.

§ 188 ^[189] **Trial may be postponed for cause.** When an indictment is called for trial, or at any time previous thereto, the court, upon sufficient cause shown by either party, may direct the trial to be postponed to any time in the same term, or to another term.

§ 189 ^[190] **Civil Code regulates postponement with exceptions—affidavit.** The provisions of the Code of Practice in civil actions, in regard to postpone-

§ 189. (1) **Affidavit may be made by a person other than defendant,** and if made at same term at which indictment is found the truth of it must be admitted if defendant is forced into trial. *Hardesty v. Com.*, 88 Ky. 537.

(2) **Amended affidavit.** After a motion for continuance has been overruled, the court may permit an amended affidavit to be filed and the motion renewed. *Com. v. Hourigan*, 89 Ky. 305; but after overruling first motion court may impose

ment of the trial of actions, shall apply to the postponement of prosecutions, on application of the defendant, except that, when the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance shall be granted, unless the attorney for the Commonwealth admit upon the trial that the facts are true.

[That whenever, in any criminal or penal action pending in any of the courts of this Commonwealth, an application shall be made by the defendant for a continuance, based upon affidavits stating the absence of one or more material witnesses, and the facts which such absent witness or witnesses would, if present, prove, the attorney for the Commonwealth shall not be compelled, in order to prevent a continuance, to admit the truth of the matter which it is alleged in the affidavit such absent witness or witnesses would prove, but only that such absent witness or witnesses would, if present, testify as alleged in the affidavit. In which event the

terms upon defendant as to subsequent motions. *Smith v. Com.*, 13 R. 612.

(3) **Constitutionality** of act of May 15, 1886, providing that affidavit for continuance may be read as a deposition without admitting its truth, is suggested in *Pace v. Com.*, 89 Ky. 204; *Unsel v. Com.*, 87 Ky. 368; *Kendall v. Com.*, 14 R. 15; *Hardesty v. Com.*, 88 Ky. 537; but in each of these cases the court refrained from expressing an opinion on this question. In *Taylor v. Com.*, 9 R. 316, the court say "whether the accused can waive the right of confronting the witnesses against him is not necessary to be determined."

(4) **Counsel—absence** of one of two or more counsel for defendant is not sufficient grounds for continuance, unless it clearly appears that a fair trial can not be had in his absence. *Stephens v. Com.*, 9 R. 742; *Brown v. Com.*, 7 R. 451.

(5) **Counter affidavits.** It is not proper to permit the Commonwealth to read affidavits contradictory of the statements made in the affidavit of the accused for a continuance; but the court may make inquiry to ascertain whether facts stated in affidavit are true, and a continuance may be granted to a day in the term. *Salisbury v. Com.*, 79 Ky. 425; *Wells v. Com.*, 12 R. 111.

(6) **Diligence.** It is not necessary that

affidavit should show that subpoena was issued and executed if subpoena is exhibited to court. *Vogt v. Com.*, 92 Ky. 68; and see further, as to facts showing diligence, *Salisbury v. Com.*, 79 Ky. 425; *Morgan v. Com.*, 14 Bush 106.

(7) **Admonition of court to witnesses** to be present on certain day does not dispense with necessity of defendant having his witnesses summoned or recognized. *Rainwater v. Com.*, 5 R. 103.

(8) **Facts showing accused entitled to continuance**, although Commonwealth consented to admit affidavit as true. *Murphy v. Com.*, 92 Ky. 485.

(9) **Facts affidavit must show.** Affidavit must show what steps have been taken to procure attendance of witness that his evidence is material, that he is within the jurisdiction of the court, and that the affiant believes facts he can prove by him are true. *Benge v. Com.*, 92 Ky. 1; *Unsel v. Com.*, 87 Ky. 368; *Stephens v. Com.*, 9 R. 742; *Smith v. Com.*, 13 R. 612; *Kendall v. Com.*, 14 R. 15.

(10) **Joint defendants.** One may rely upon diligence of other to procure attendance of witnesses, and when the one who has attended to it has used diligence, the other is entitled to a continuance if witnesses are not present, the witnesses for each being the same. *Walker v. Com.*, 5 R. 861.

defendant may, on the trial, read such affidavit as the deposition of such absent witness or witnesses, subject, however, to exception for irrelevancy or incompetency; and the attorney for the Commonwealth shall be permitted to controvert the statements of such affidavit so read by other evidence, and to impeach such absent witness or witnesses to the same extent as if he were personally present: *Provided, however,* The court may, when, from the nature of the case, it shall be of opinion that the ends of justice require it, grant a continuance, unless the attorney for the Commonwealth will admit the truth of the matter which it is alleged in the affidavit such absent witness or witnesses would testify to.

The provisions of this section shall not apply to a motion for a continuance made at the same term at which the indictment in the action is found.] (*Words in brackets act 1886; provisions of Civil Code referred to, sec. 315.*)

(11) **Non-resident witness.** It is not error to refuse a continuance asked for because of the absence of a witness who resides in another State, when it is improbable that he could be produced at the next term, and there are other witnesses who will testify to the facts that can be proved by him. *Kennedy v. Com.*, 78 Ky. 447; nor to refuse a continuance where the affidavit failed to state that the subpoenas which were issued had been delivered to any person authorized to execute them. *Mackey v. Com.*, 80 Ky. 345.

(12) A continuance should be granted when the evidence of the absent witness is material and proper diligence has been used to secure his attendance, although the witness may be a resident of another State, if there are reasonable grounds to believe his presence can be secured at the next term. *White v. Com.*, 80 Ky. 480.

(13) **Other evidence introduced,** proving what defendant expected to show by absent witnesses, refusal to grant continuance not error. *Williams v. Com.*, 13 R. 753; *Simmons v. Com.*, 13 R. 839; *Tra-bune v. Com.*, 13 R. 343; *Roberts v. Com.*, 94 Ky. 499.

(14) **Personal attendance of witness.** Facts showing defendant was not prejudiced by failure to secure the personal attendance

of his witness, although he filed an affidavit stating that personal attendance was necessary. *Davis v. Com.*, 6 R. 654; see sec. 556 Civil Code. Does this section apply in criminal cases? *Com. v. Minor*, 89 Ky. 555.

(15) **Refusal to grant — reversible error.** When the affidavit of the defendant shows that he is entitled to a continuance, the Court of Appeals will reverse for the error in overruling his motion. *Morgan v. Com.*, 14 Bush 106; *Salisbury v. Com.*, 79 Ky. 425; *Wells v. Com.*, 12 R. 111.

(16) **Truth of affidavit admitted.** When the facts to which it is alleged the witness will testify are admitted to be read as true by the Commonwealth, a continuance should not be granted; nor can the Commonwealth introduce evidence tending to disprove the facts admitted as true. *Young v. Com.*, 8 Bush 366; *Pace v. Com.*, 89 Ky. 204; *O'Brien v. Com.*, 89 Ky. 354; *Nichols v. Com.*, 11 Bush 575.

(17) **Witness absenting himself after jury sworn** entitles defendant to a continuance if his evidence is material, and his attendance can not be procured and it appears that there was no collusion between defendant and the witness. *Costigan v. Com.*, 11 R. 617; *Joseph v. Com.*, 8 R. 53.

ARTICLE 4.

THE JURY.

- SUBDIVISION 1. FORMATION OF THE JURY, 190.
2. CHALLENGING THE JURY, 197.

SUBDIVISION 1.

FORMATION OF THE JURY.

- § 190. Jury—how summoned and selected.
§ 191. Clerk to draw jury as directed by statute.
§ 192. Panel—how filled.
§ 193. Court may appoint person to summon jury.
§ 194. Jurors may be summoned from adjoining county.
§ 195. Mileage and pay of jurors from adjoining county.
§ 196. Sheriff may summon—attendance coerced.

§ 190 [191] **Jury—how summoned and selected.** The jury for the trial of criminal prosecutions shall be selected and summoned as provided in the General Statutes [now Kentucky Statutes]. (*See Ky. Stat., sec. 2266.*)

§ 191 [192] **Clerk to draw jury as directed by statute.** When an issue of fact in a criminal prosecution is about to be tried, the clerk shall draw, in the manner directed by the General Statutes [now Kentucky Statutes], the names of twelve jurors, who, if not challenged by the parties, nor excused by the court, shall compose the trial jury. (*See Ky. Stat., sec. 2266.*)

§ 192 [193] **Panel—how filled.** When a juror is excused or a challenge to a juror is sustained the clerk shall draw the name of another juror to fill the panel until the list of standing jurors is exhausted, when the court shall order such a number of qualified jurors as it shall deem sufficient to complete the jury to be summoned by the sheriff, and the panel shall be filled from time to time from the jurors so summoned, and if they be exhausted, similar orders may be made for summoning other jurors, until the jury is completed. (*Selection of jury after panel exhausted, Ky. Stat., secs. 2247, 2266.*)

§ 193 [194] **Court may appoint person to summon jury.** The court may, for sufficient cause, designate some other officer or person than the

§ 191. (1) **Challenge—practice.** See notes to sec. 215; and Ky. Stat., sec. 2266.

(2) **Less than twelve jurors.** In a prosecution for misdemeanor, by consent of the defendant, he may be tried by less
(30)

than twelve jurors. *Murphy v. Com.*, 1 Met. 365; *Tyra v. Com.*, 2 Met. 1.

§ 193. **Special bailiffs**—one or more may be appointed, as provided in this section, to summon jurors. *Roberts v. Com.*, 94

sheriff to summon petit jurors, the officer or person designated being first duly sworn in open court to discharge the duty faithfully and impartially.

§ 194 [198] **Jurors may be summoned from adjoining county.** If the judge of the court be satisfied, after having made a fair effort, in good faith, for that purpose, that, from any cause, it will be impracticable to obtain a jury free of bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury may be formed.

§ 195 [196] **Mileage and pay of jurors from adjoining county.** The jurors so summoned shall be allowed the same mileage as witnesses, and the same pay as other jurors while in attendance at the courts.

§ 196 [197] **Sheriff may summon—attendance coerced.** The sheriff shall have the same power of summoning jurors under such order that he would have in the county of which he is the sheriff, and the court the same power of coercing the attendance of such jurors that it would have if they were summoned in the same county.

SUBDIVISION 2.

CHALLENGING THE JURY.

- § 197. Challenge may be to panel or individual juror.
- § 198. Challenge of one defendant is challenge of all.
- § 199. Grounds of challenge to panel.
- § 200. Proceedings when challenge to panel sustained.
- § 201. Challenge to juror is peremptory or for cause.
- § 202. Must be made before juror sworn in chief, unless by leave.
- § 203. Peremptory challenges allowed defendant.
- § 204. Peremptory challenges allowed Commonwealth.
- § 205. Either party may challenge for cause.

Ky. 499; and may with the consent of the court appoint an assistant. *Forman v. Com.*, 86 Ky. 605; and the unsupported affidavit of defendant that the person appointed is not suitable, because biased against accused is not sufficient evidence of error in this respect. 86 Ky. 605; the court may on its own motion appoint a special bailiff when it

appears that sheriff is related to accused. *Allen v. Com.*, 11 R. 555.

§ 194. (1) **Jurors from adjoining county.** The manner in which the judge is to satisfy himself that a jury can not be obtained in county where prosecution is pending is by making a fair effort to obtain a jury in that county, and his action can not be controlled by the affi-

- § 206. Challenge may be general or particular.
- § 207. Causes of general challenge.
- § 208. Particular causes of challenge.
- § 209. Actual bias defined.
- § 210. Implied bias—what is.
- § 211. Exemption from service no ground of challenge.
- § 212. Challenge tried by court—how determined.
- § 213. Juror may be examined on challenge.
- § 214. Other witnesses may be examined.
- § 215. Commonwealth to challenge first.
- § 216. Order of challenges.

§ 197 [199] **Challenge to panel or individual juror.** A challenge is an objection to the trial jurors and is of two kinds—

1. To the panel.
2. To the individual juror.

§ 198 [199] **Challenge of one defendant is challenge of all.** When several defendants are tried together the challenge of any one of the defendants shall be considered the challenge of all.

§ 199 [200] **Grounds of challenge to panel.** A challenge to the panel shall only be for a substantial irregularity, in selecting or summoning the jury, or in drawing the panel by the clerk. (*See as to selecting and summoning jury, Ky. Stat., sec. 2241.*)

§ 200 [201] **Proceedings when challenge to panel sustained.** If the challenge be sustained on the ground of irregularity in selecting or summoning the jury, all the standing jurors shall be excluded from the trial jury, and it shall be composed of persons summoned by the sheriff, or other officer appointed by the court for that purpose; if sustained because of irregularity in drawing the panel, all the names of the standing jury shall be replaced and another panel drawn.

§ 201 [202] **Challenge to juror peremptory or for cause.** The challenge to the individual juror is either—

davit of the defendant. *Roberts v. Com.*, 94 Ky. 499.

(2) There having been three trials of a case in the same county the court was authorized to send to an adjoining county for the jury in fourth trial without making any effort to obtain jury in county where trial was pending except to exhaust the regular panel. *Brafford v. Com.*, 13 R. 154.

§ 197. **Practice in challenging.** See notes to sec. 215.

§ 198. **Challenge of one challenge of all—** and this rule applies to a defendant who was granted a separate trial after trial had proceeded for a time against all the defendants. *Glass v. Com.*, 16 R. 108.

§ 199. (1) **Challenge — waiver.** An objection for error in the formation of the petit jury is waived unless made at the proper time. *Hazzard v. Com.*, 79 Ky. 366. Decisions of the court upon challenges to the panel or for cause are not subject to exception. Sec. 281; *Morgan v. Com.*, 14 Bush 106; *Rutherford v. Com.*, 13 Bush 608; *Terrell v. Com.*, 13 Bush 246.

(2) **Failure to put in wheel number of names provided in sec. 2241, Ky. Stat.—** when reversible error. *Risner v. Com.*, 95 Ky. 539.

§ 201. **Practice in challenging.** See notes to sec. 215.

1. Peremptory; or,
2. For cause.

§ 202 ⁽³⁰²⁾ **Must be made before juror sworn in chief, unless by leave.** It must be taken before he is sworn in chief, unless the court, for good cause, permit it to be made at any time before the jury is completed.

§ 203 ⁽³⁰³⁾ **Peremptory challenges allowed defendant.** The defendant is entitled to [fifteen] peremptory challenges in prosecutions for felony, and to three in prosecutions for misdemeanor. (*Fifteen in place of twenty, acts 1893.*)

§ 204 ⁽³⁰⁴⁾ **Peremptory challenges allowed Commonwealth.** The Commonwealth shall be entitled to five peremptory challenges in prosecutions for felony, and to three in prosecutions for misdemeanor.

§ 205 ⁽³⁰⁵⁾ **Either party may challenge for cause.** The challenge for cause may be taken either by the Commonwealth or by the defendant.

§ 206 ⁽³⁰⁶⁾ **Challenge may be general or particular.** It may be general, that the juror is disqualified from serving in any case, or particular, that he is disqualified from serving in the case on trial.

§ 207 ⁽³⁰⁷⁾ **Causes of general challenge—newspaper accounts.** Causes of general challenge are—

1. A want of the qualifications prescribed in the General Statutes [now Kentucky Statutes]. (*See Ky. Stat., sec. 2253.*)
2. A conviction for a felony.
3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as render him incapable of properly performing the duties of a juror.

[It shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence; and provided further, that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence,

§ 203. **Construction of statute.** It was held under the Code of 1854 that these provisions affected the proceedings only, were not *ex post facto* laws, and that they applied to prosecutions pending when

the Code took effect. *Walston v. Com.*, 16 B. M. 15.

§ 205. **Challenge—cause.** Decisions of the court upon challenge for cause are not subject to exceptions. Sec. 281; 14

and the court shall be satisfied of the truth of such statement.]
(*Words in brackets act of 1888.*)

§ 208 [309] **Particular causes of challenge.** Particular causes of challenge are actual and implied bias.

§ 209 [310] **Actual bias defined.** Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case, or to either party, as satisfies the court, in the exercise of a sound discretion, that he can not try the case impartially and without prejudice to the substantial rights of the parties challenging.

§ 210 [311] **Implied bias—what is.** A challenge for implied bias may be made—

1. If the juror be related by consanguinity, or affinity, or stand in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or be a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

2. If he be adverse to the defendant in a civil suit, or have complained against or been accused by him in a criminal prosecution.

3. If he have served on the grand jury which found the indictment, or on the coroner's jury which inquired into the death of the party, whose death is the subject of the indictment.

4. If he have served on a trial jury, which has tried another person for the offense charged in the indictment.

5. If he have been one of a former jury sworn to try the same indictment, and whose verdict was set aside, or who were discharged without a verdict.

6. If he have served as a juror in a civil action brought against the defendant for the act charged in the indictment.

7. When the offense is punishable with death, if he entertain such conscientious opinions as would preclude him from finding the defendant guilty. (*See act under sec. 207.*)

§ 211 [317] **Exemption from service no ground for challenge.** An exemption from serving on a jury is not a cause of challenge.

§ 212 [318] **Challenge tried by court—how determined.** Challenges shall be tried and determined by the court in a summary manner, without the issues of law or fact arising thereon being reduced to writing, except when the court disallows a challenge for implied bias.

Bush 106; 13 Bush 246; *ib.* 608; see, as to practice, notes to sec. 215.

§ 210. **Implied bias—waiver.** The de-

fendant may waive objection to a juror on account of implied bias. *O'Brian v. Com.*, 9 Bush 333.

§ 213^[213] **Juror may be examined on challenge.** The juror may be examined on oath by either party, upon the challenge.

§ 214^[214] **Other witnesses may be examined.** Other witnesses may also be examined and their attendance coerced.

§ 215^[215] **Commonwealth to challenge first—practice.** The challenges to the juror shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenges to each juror before the other begins.

§ 216^[216] **Order of challenges.** The challenges of either party need not be all taken at once, but separately, in the following order:

1. To the panel.

§ 215 (1) **Challenge—practice.** "Under the Code, each party is entitled to have a full panel of twelve jurors, found upon examination qualified to try the case, before being required to exercise the right of challenge to the individual juror; and whenever the number is lessened by challenge of either party, the panel must be filled before being passed on, and so on until the jury is completed. When a full panel of qualified jurors is presented, the Commonwealth must then either accept or challenge. Having accepted or declined to challenge, the challenges as to those then passed on are, in the language of the Code, exhausted; or, having challenged one or more, the others must be considered as accepted. The right of challenge is to be exercised by the Commonwealth and by the defendant in the same manner and upon the same conditions, the only difference being as to the number of peremptory challenges allowed to each. The defendant, as well as the Commonwealth, is therefore required to exhaust his challenges to each juror of a panel when presented to be passed upon." *Munday v. Com.*, 81 Ky. 233; *Edrington v. Com.*, 7 R. 377.

(2) "A full panel of twelve jurors found upon examination qualified to try the case should have been first presented to the Commonwealth for its acceptance or challenge, and all not then challenged should have been regarded as accepted; then the full panel should have been presented to the accused for his acceptance or challenge, and all not then challenged should have been regarded as accepted by him and not subject to be again

passed on by either party; but, in case of the challenge of one or more by either party, the vacancies should have been filled from time to time so as to present to each party for acceptance or challenge twelve qualified jurors, including those already accepted." By qualified jurors is meant jurors qualified after examination to sit in the case. *Jenkins v. Com.*, 9 R. 254; *Wilson v. Com.*, 9 R. 274.

(3) After twelve men had been proven competent jurors upon a *voir dire* examination and before they were sworn the defendant had a right to challenge without cause; this right may be waived, but it is not waived either by the Commonwealth or the accused by an examination of the individual juror as to his fitness. *Shelby v. Com.*, 91 Ky. 563.

(4) **Practice.** Where a portion of the regular panel are engaged in considering a case bystanders may be summoned to make up with the unoccupied jurors the full panel. *McClelland v. Com.*, 11 R. 301; *Ky. Stat.*; sec. 2266.

(5) After a jury had been selected but before they were sworn the Commonwealth's attorney filed an affidavit showing that one of them had expressed an opinion, thereupon the entire jury was discharged and an order made directing the sheriff to summon twenty-four jurors, including the eleven who had been discharged. Held that it would have been proper to have summoned an entire new jury, but the failure to do so was not a reversible error. *Shelby v. Com.*, 91 Ky. 563.

§ 216. See notes to secs. 210, 215.

2. To the juror for general disqualification.
3. To the juror for implied bias.
4. To the juror for actual bias.
5. Peremptory.

ARTICLE 5.

CONDUCT OF THE JURY TRIAL.

- § 217. Oath of jury to try issue.
- § 218. Oath if no issue made.
- § 219. Indictment to be read and plea stated.
- § 220. Statement for Commonwealth.
- § 221. Introduction of evidence for Commonwealth.
- § 222. Statement for defense.
- § 223. Introduction of evidence for defendant.
- § 224. Rebutting evidence.
- § 225. Instructions to be in writing.
- § 226. Jury to withdraw during argument on instructions.
- § 227. Argument—order of.
- § 228. Arguments to alternate.
- § 229. Defendant to remain in custody during felony trial.
- § 230. Proceedings if offense committed out of jurisdiction.
- § 231. Proceedings if offense committed out of State.
- § 232. Proceedings if higher grade of offense proven.
- § 233. Indictment to be quashed—when.
- § 234. Joint defendants can not testify for each other—when.
- § 235. Questions of law to be decided by court.
- § 236. Jury may view place offense committed—when.
- § 237. Joint defendants in felony entitled to separate trial.
- § 238. Reasonable doubt entitles defendant to acquittal.
- § 239. Conviction to be of lower, if doubt as to degree.
- § 240. Confession out of court must be corroborated.
- § 241. Testimony of accomplice must be corroborated.
- § 242. Peremptory instruction to acquit if corroboration not sufficient.
- § 243. Attorney for Commonwealth may dismiss indictment—effect of.
- § 244. Cases in which jury must be kept together.
- § 245. Officers in charge of jury to be sworn.
- § 246. Admonition of court to jury.
- § 247. Room for jury—board and lodging.
- § 248. Jury to take all papers and other things received as evidence.
- § 249. Information as to law or evidence after case submitted.
- § 250. Sickness of juror before jury completed.
- § 251. Discharge of jury—provision if juror sick.
- § 252. Jury discharged, cause to be tried again.
- § 253. Court always open while jury deliberating.
- § 254. Final adjournment discharges jury.

§ 217 [212] **Oath of jury to try issue.** When a jury, consisting of twelve qualified jurors, shall have been duly impaneled, they shall be sworn substantially as follows:

"You, and each of you, do solemnly swear, that you will well and truly try the issue, and a true verdict render, in the case of the Commonwealth of Kentucky against A B, defendant."

§ 218 (319) **Oath if no issue made.** If no issue be made by the pleadings, the words "well and truly try the issue, and" shall be omitted from the oath.

§ 219 (320) **Indictment to be read and plea stated.** The clerk, or Commonwealth's attorney, shall then read to the jury the indictment, and state the defendant's plea. (*What pleas may be entered, sec. 172. Arraignment, secs. 154, 155.*)

§ 220. **Statement for Commonwealth.** The attorney for the Commonwealth may then state to the jury the nature of the charge against the defendant, and the law and evidence upon which he relies in support of it.

§ 221 (321) **Introduction of evidence for Commonwealth.** The counsel for the

§ 219. (1) **Reading of indictment — plea.** Where an indictment charges two offenses and one of them is dismissed it is not error for Commonwealth's attorney to read entire indictment to jury when he states offense being tried. *Greenwood v. Com.*, 11 R. 220.

(2) Requirement that indictment shall be read and plea stated is mandatory, but fact that indictment is read by an attorney employed to prosecute is not error. *Galloway v. Com.*, 5 R. 213.

(3) See further, sec. 154 and notes thereto.

(4) An order reciting that "came parties, and defendant having heretofore pleaded not guilty of the offense charged in the indictment for his trial puts himself upon his country and the attorney for the Commonwealth does likewise," although it does not state in terms that indictment was read to jury or plea stated is sufficient. *Patterson v. Com.*, 86 Ky. 313.

§ 220. (1) **Statement for Commonwealth** may be made by an attorney other than attorney for Commonwealth. *Roberts v. Com.*, 94 Ky. 499.

(2) Attorney for Commonwealth should not be permitted to read writings he intends to introduce as evidence, but when the writings are introduced the error will not be reversible if writings

were competent. *O'Brien v. Com.*, 89 Ky. 354.

§ 221. (1) **Accomplice.** See sec. 241 and notes.

(2) **Affidavit for continuance** admitted to be read as true can not be controverted. *Pace v. Com.*, 89 Ky. 204; *Young v. Com.*, 8 Bush 366; *O'Brien v. Com.*, 89 Ky. 354; and see notes to sec. 189.

(3) **Belief of accused that he was in danger** when he killed deceased may be shown by his testimony. *Williams v. Com.*, 90 Ky. 596.

(4) **Burden of proof on defendant.** In all statutory crimes it is competent for the Legislature to say that certain acts proven by the Commonwealth shall be sufficient to make out a presumptive case against the accused and cast the burden on him; but the burden can not be cast on defendant until the Commonwealth has first proven some material fact conducing to his guilt. *Com. v. Minor*, 88 Ky. 422; as illustrations of such laws, see Ky. Stat., secs. 2571, 1967.

(5) **Character of deceased**—evidence to sustain can not be introduced until it has been attacked. *Parker v. Com.*, 116 R. —; *Webb v. Com.*, 11 R. 642.

(6) Upon the trial of the accused for murder it was held proper under the facts of this case to permit him to prove

Commonwealth must then offer the evidence in support of the indictment.

that the deceased was a man of violent, cruel and bloodthirsty disposition, and in the habit of carrying concealed deadly weapons. *Payne v. Com.*, 1 Met. 370; *Riley v. Com.*, 94 Ky. 266.

(7) **Character of accused, if he testify**, may be put in issue as that of any other witness, and the Commonwealth is not confined to his character for truth, but may assail his general moral character. *Lockard v. Com.*, 87 Ky. 201; *Burdette v. Com.*, 93 Ky. 76; *Pace v. Com.*, 89 Ky. 204; but the inquiry as to his character for morality and truth must relate to the time he testifies and not when he committed the crime. *Com. v. Hourigan*, 89 Ky. 305; 78 Ky. 219; 86 Ky. 10; and it is not proper to go into details of particular acts making up character, whether good or bad. *Smith v. Com.*, 13 R. 31.

(8) The Commonwealth is not allowed to call witnesses to prove the bad character of the accused unless to rebut the evidence of good character already introduced by him; and evidence as to character must be restricted to the trait of character which is in issue. *Young v. Com.*, 6 Bush 312.

(9) Proof of character in aid of the presumption of innocence is admissible. 6 Bush 312; but should be limited to the time of the discovery of the commission of the offense, and should not extend to the date of the arrest, and is not allowed to extend to particular acts or conduct in special cases. *White v. Com.*, 80 Ky. 480. Nor should proof of the bad character of any of the family of the accused be admitted. *McClure v. Com.*, 81 Ky. 448.

(10) **Character of witness.** The Commonwealth can not introduce evidence of particular facts for the purpose of affecting the credibility of the witnesses for the defendant, as that "one of them had been prosecuted for false swearing, and that all of the witnesses introduced by the defendant belonged to a clique that were banded together to swear negroes out of any offense charged against

them." *Taylor v. Com.*, 3 Bush 508. Nor is proof that the family or associates of the witness are in bad repute competent. *Kean v. Com.*, 10 Bush 190. In impeaching the credit of a witness by general evidence, the examination must be confined to his general reputation, and is not permitted as to particular facts. *Thurman v. Virgin*, 18 B. M. 785; *Young v. Com.*, 6 Bush 312; and see notes to secs. 597-599, Civil Code, page 305.

(11) "In order to impeach a witness the evidence of bad character should be directed to the time of the trial, and to this end under proper circumstances evidence of previous bad character is competent; while the evidence of bad character at a time previous may tend to show the character of the witness at the present, it should be admitted with some caution." *Mitchell v. Com.*, 78 Ky. 219.

(12) "An impeaching witness should be able to say that he knows the general estimation in which the witness sought to be impeached is held among those who know him, or among whom he lives. If he does, then he may say whether the witness is esteemed by his neighbors and those who know him as a person of good moral character or not." *Furnish v. Com.*, 14 Bush 180.

(13) Impeachment of character of witness, whose affidavit is read as a deposition, is allowable, and witness may be impeached without regard to materiality of his evidence. *Davis v. Com.*, 95 Ky. 19.

(14) **Circumstantial evidence.** Circumstantial evidence, "when of a satisfactory character, sufficient to warrant a conviction, should be left like direct or positive evidence to be considered by the jury, and to have such weight as they deem it entitled to." *Brady v. Com.*, 11 Bush 282.

(15) There is no law requiring the court, at the instance of the accused, to have dead bodies taken up and examined at the expense of the State or county for the purpose of furnishing him with evidence. *Salisbury v. Com.*, 79 Ky. 425.

§ 222. **Statement for defendant.** The defendant, or his attorney, may then state the nature of his defense, and the law and evidence upon which he relies in support of it.

§ 223 ~~[222]~~ **Introduction of evidence for defendant.** The defendant, or his counsel, must then offer his evidence in support of his defense.

(16) Circumstantial evidence is competent to establish the fact that the person charged to have been murdered is dead, and it is for the jury to determine its conclusiveness. *Johnson v. Com.*, 81 Ky. 325; and see *O'Brien v. Com.*, 89 Ky. 354, holding that where circumstantial evidence has to be relied on, any fact which is necessary to introduce or explain another may be proved; and see further, *Riley v. Com.*, 94 Ky. 266; *Com. v. Hide*, 94 Ky. 517.

(17) **Confessions.** See sec. 240 and notes.

(18) **Competency.** The Court of Appeals can not "speculate" on the effect of incompetent evidence. It is enough to know it was wrong, and may have operated to the prejudice of the defendant. *Kennedy v. Com.*, 14 Bush 340; *Coppage v. Com.*, 3 Bush 532.

(19) Any person can testify without regard to his religious belief or disbelief, and it is not proper to make any inquiry concerning it. *Bush v. Com.*, 80 Ky. 244.

(20) All persons are competent except those excluded by sec. 1180, Ky. Stat. *Com. v. McGuire*, 84 Ky. 57; 89 Ky. 555; *Combs v. Com.*, 15 R. 660.

(21) **Conspiracy.** See notes to sec. 234, and observe that that section has been repealed since the decision of cases cited. Does its repeal permit conspirators to testify in all cases for each other, as each can now testify for himself?

(22) **Contradiction of witness.** Before evidence can be introduced to contradict a witness he must first be inquired of as to such statements with circumstances of time, place and persons present, and this rule applies where the witness sought to be impeached is dead, and evidence is introduced as to his statements in the former trial; and statements made by the witness (who is dead, and whose testimony is repro-

duced) subsequent to the former trial, showing that the testimony given by him was false, were not competent. *Craft v. Com.*, 81 Ky. 250.

(23) Where the evidence of an accomplice is corroborated, he occupies the same position as any other witness so far as the method of contradicting or impeaching him is concerned. *Com. v. Craft*, 81 Ky. 250.

(24) "Where a witness states a fact prejudicial to the party calling him, the latter may be allowed to show that such fact does not exist by proving that the witness had made statements to others inconsistent with his present testimony." *Blackburn v. Com.*, 12 Bush 181; *Champ v. Com.*, 2 Met. 17.

(25) "A witness can not be cross-examined upon facts collateral and irrelevant to the issue for the purpose of contradicting him; his answers to such facts being conclusive against the party calling for them; nor can a witness who fails to testify to substantive facts be asked if he has not made statements to others out of court that such facts exist for the purpose of proving that he has made such statements. *Loving v. Com.*, 80 Ky. 507; *Kennedy v. Com.*, 14 Bush 340; *Crittenden v. Com.*, 82 Ky. 164; *Champ v. Com.*, 2 Met. 17; *Cornelius v. Com.*, 15 B. M. 539.

(26) Where a witness on cross-examination stated that he had not said he heard deceased make certain statements, it was error to allow proof that witness had made such a statement. *Com. v. Hourigan*, 89 Ky. 305.

(27) **Declarations.** Statements of the accused explanatory of certain acts which he did shortly before killing were not competent. *Oder v. Com.*, 80 Ky. 32; *Terrell v. Com.*, 13 Bush 246. "Declarations of one conspirator are only admissible against the others when made before the object of the conspiracy is ac-

§ 1. [Defendant may testify—act 1886.] That in all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this Commonwealth, the defendant on trial, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon, or be allowed to create any presumption against him or her.

omplished." *Miller v. Com.*, 78 Ky. 15; *Thompson v. Com.*, 1 Met. 13; *Hudson v. Com.*, 2 Duv. 531; *Jones v. Com.*, 2 Duv. 554.

(28) A plea of guilty made in an examining court may be proved by oral testimony. *Rector v. Com.*, 80 Ky. 468.

(29) Statements of persons who had agreed to act in concert with the accused in the event of a hostile meeting between him and deceased are competent for the Commonwealth; and, when such statements are asked for, the accused has the right to have the whole of the conversation at that time. *Cornelius v. Com.*, 15 B. M. 539; and see *Rapp v. Com.*, 14 B. M. 614.

(30) Diagram of premises where killing occurred may be examined and referred to by witness who made it. *Com. v. Hourigan*, 89 Ky. 305.

(31) Drunkenness is no excuse for crime, but evidence of drunkenness is competent to show want of malice. *Buckhanan v. Com.*, 86 Ky. 110; *Wilkerson v. Com.*, 88 Ky. 29; *Shannahan v. Com.*, 8 Bush 463; and where a felonious intent is necessary to constitute an offense—such as robbery—the accused may show that he was too drunk to have any intent when he committed the act. *Keeton v. Com.*, 92 Ky. 522.

(32) Dying declaration. The admission of proof of dying declarations is not an infringement of the constitutional right of the accused to confront his witnesses face to face; but, to be admissible, the declaration must be made in *extremis*, and under a solemn sense of impending dissolution. *Walston v. Com.*, 16 B. M. 15.

(33) A statement by the deceased as to how and by whom he was injured, made about twenty minutes before he became insensible, in which condition he re-

mained until he died, coupled with the statement "that he was ruined and a dead man, unless he got speedy relief," was held not to have been made under a sense of impending dissolution. *Adwell v. Com.*, 17 B. M. 310.

(34) A declaration of a wounded person, made and reduced to writing two hours before his death, when he believed he would recover, if afterward referred to by him shortly before his death, and when he knew he must die, and its truth affirmed, is competent evidence. "Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head or a glance of the eye." *Mockabee v. Com.*, 78 Ky. 380; and see *Young v. Com.*, 6 Bush 312.

(35) The admission of dying declarations should be restricted to the act of killing and the circumstances immediately attending it and forming a part of the *res gestæ*. *Leiber v. Com.*, 9 Bush 11; and see *Collins v. Com.*, 12 Bush 271; *Terrell v. Com.*, 13 Bush 246; *Luby v. Com.*, 12 Bush 1.

(36) Dying declaration must relate to the circumstances attending the crime, only so much of it is competent as details the manner of it. Statement that "he was shot for nothing" was incompetent, but, as this was proved by other witnesses, its introduction was not prejudicial. *Pace v. Com.*, 89 Ky. 204; and see *Chittenden v. Com.*, 10 R. 330.

(37) To be admissible they must be made when the party has given up all hope of life; but whether this be the case or not may be determined by the surrounding circumstances and by the evident danger of the deceased, and he need not in express words or in equivalent language declare that he knows he is about

§ 2. The defendant requesting that he be allowed to testify shall not be allowed to testify in chief after any other witness has testified for the defense.

[§ 3. If two or more persons are jointly indicted, they may testify for each other unless a conspiracy is charged in the indictment and proven to the satisfaction of the court. (*See next sec.*)

to die. *Com. v. Matthews*, 80 Ky. 287
Peoples v. Com., 87 Ky. 487.

(38) A mere belief of the party that he would die is not sufficient to warrant the introduction of his statements as a dying declaration. *Vaughan v. Com.*, 86 Ky. 431.

(39) If dying declaration has been reduced to writing the writing should be introduced as the best evidence, but if writing is excluded by objection of accused then oral evidence is competent. Statements made at different times may be proved if otherwise competent. *Hines v. Com.*, 90 Ky. 64; *Blyew v. Com.*, 91 Ky. 200.

(40) "To the general rule excluding matters of opinion or belief an exception should be made, allowing the declarations of the deceased in behalf of the accused where they will explain the acts and conduct of deceased, or show his feelings or motives, intent or belief, when they are essential to qualify or aggravate his conduct." *Haney v. Com.*, 5 R. 203.

(41) Defendant may introduce dying declarations in his behalf, and the statement of deceased that he and accused were playing and that the shooting was an accident, *Com. v. Matthews*, 80 Ky. 287; or that he "was wholly to blame for the difficulty and brought on the trouble himself and did not want accused prosecuted," is competent. *Brock v. Com.*, 92 Ky. 183; *Haney v. Com.*, 5 R. 203.

(42) Any fact which the deceased could testify to if alive is admissible as his dying declaration. 92 Ky. 183.

(43) Upon trial of one accomplice it is not competent to prove a dying declaration of the other exculpating the one on trial. *Mitchell v. Com.*, 12 R. 458; nor can defendant prove that another person made a dying declaration that he and not accused committed crime. *Davis v. Com.*, 93 Ky. 19.

(44) Nor is it any objection that deceased was at the time under influence of narcotics; such objection would go to credibility alone. *Hays v. Com.*, 12 R. 611.

(45) **Husband and wife.** Wife is a competent witness against her husband where he is charged with committing or attempting to commit a crime against her. *Com. v. Sapp*, 90 Ky. 580, overruling *Turnbull v. Com.*, 79 Ky. 496.

(46) A divorced wife is a competent witness in behalf of her husband, to prove facts which came to her knowledge while the marriage relation existed between them, but which did not come to her confidentially, nor by means of her situation as his wife. *Elswick v. Com.*, 13 Bush 155.

(47) The wife of one of three defendants in an indictment was a competent witness against the other two, after the indictment had been dismissed as to her husband. *Ray v. Com.*, 12 Bush 397.

(48) Under a joint indictment against several for murder, one of them being awarded a separate trial, the wives of the others were competent witnesses for him. *Thompson v. Com.*, 1 Met. 13; *Cornelius v. Com.*, 3 Met. 481.

(49) "Communication" between husband and wife—meaning of, 90 Ky. 580; and see as to competency of letters written by husband to wife, *Scott v. Com.*, 94 Ky. 511; see further, notes to sec. 606 Civil Code, page 313.

(50) **Error in admitting** incompetent evidence under an indictment for murder prejudicial, although accused found guilty of manslaughter. *Scott v. Com.*, 94 Ky. 511.

(51) **False swearing.** Evidence of one witness not sufficient to convict—corroborating circumstances—written evidence. *Com. v. Davis*, 92 Ky. 460.

(52) **Flight—feigned insanity** of accused

§ 4. If a conspiracy is charged in the indictment and proven to the satisfaction of the court, then each defendant named in the indictment may testify on his own behalf, as above provided in sections one and two of this act.] (*These two sections repealed by act 1894.*)

competent against him. *Basham v. Com.*, 87 Ky. 440.

(53) **Foreign records**—proper authentication of. *Faustre v. Com.*, 92 Ky. 34; *Mount v. Com.*, 1 Duv. 90.

(54) **Insanity**. Opinions of non-professional witnesses as to the sanity of the defendant may be admitted as evidence, but the court should be satisfied before admitting such evidence that the witness has had an opportunity, by association and observation, to form an opinion as to the sanity of the accused. *Brown v. Com.*, 14 Bush 398; *Cotrell v. Com.*, 13 R. 305; *Massie v. Com.*, 15 R. 562.

(55) An expert should not be allowed to express his professional opinion as to the sanity of the accused unless there is a hypothetical case or agreed facts submitted to him. 14 Bush 398; *McCarthy v. Com.*, 14 R. 285; *Davis v. Com.*, 6 R. 658.

(56) Evidence that the accused has been from infancy afflicted with *somnolentia* or *somnambulism* is competent. *Fain v. Com.*, 78 Ky. 183.

(57) As to moral insanity, see *Scott v. Com.*, 4 Met. 227; *Graham v. Com.*, 16 B. M. 587; *Smith v. Com.*, 1 Duv. 224.

(58) Competency of physician who does not claim to be an expert. *Montgomery v. Com.*, 88 Ky. 509.

(59) Contradiction of physician by showing former statements in conflict with his testimony. 88 Ky. 509.

(60) Evidence of insanity both before and after commission of crime is competent. 88 Ky. 509; *Moore v. Com.*, 92 Ky. 680.

(61) To authorize admission of testimony of insanity of parents or relatives of accused it should first appear by other evidence that defendant was insane when he committed act; but see this case for exceptions to rule. *Murphy v. Com.*, 92 Ky. 485.

(62) Defense for crime—not sufficient

to show alone that accused was insane when he committed crime; it must appear that by reason of his insanity he did not know right from wrong, or did not have sufficient will power to control his actions. 88 Ky. 509.

(63) **Incompetent evidence**. Exception—practice. See note 17, sec. 340.

(64) **Limiting effect of testimony by instruction** is proper where the evidence is only introduced for or competent for the purpose of contradicting a witness. *Fueston v. Com.*, 91 Ky. 230; *Collins v. Com.*, 15 R. 601.

(65) **Liquor selling illegally**. Evidence upon which conviction may be had. Ky. Stat., sec. 2571.

(66) **Malice — manslaughter**. Incompetent to prove declarations showing malice under indictment for manslaughter. *Com. v. Matthews*, 89 Ky. 287.

(67) **Motive for crime**. Competent to show. *O'Brien v. Com.*, 89 Ky. 354; *Martin v. Com.*, 93 Ky. 189; *Carpenter v. Com.*, 92 Ky. 452.

(68) Motive of accused—evidence in his behalf. See *Massie v. Com.*, 15 R. 562.

(69) **Part of a statement being proved** by defendant it is proper to allow Commonwealth to prove remainder. *O'Brien v. Com.*, 89 Ky. 354.

(70) **Prisoner in penitentiary** may testify in criminal case unless he is disqualified under sec. 1180, Ky. Stat. *Com. v. Minor*, 89 Ky. 555; *Combs v. Com.*, 15 R. 660.

(71) **Provocation**. Words tending to excite passions—competent to reduce crime to manslaughter. *Massie v. Com.*, 15 R. 562; *Stott v. Com.*, 16 R. —

(72) **Questions that degrade or disgrace** may be asked for the purpose of impairing credibility of witness, but he can not be required to expose himself to punishment or prosecution for crime. *Burdette v. Com.*, 93 Ky. 76. Witness may

§ 224 [223] **Rebutting evidence.** The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

be asked if he has not been in the penitentiary. *Mitchell v. Com.*, 12 R. 458; or has not been indicted for robbery. *Roberts v. Com.*, 14 R. 219.

(73) **Rape.** Evidence sufficient to convict. *Malone v. Com.*, 91 Ky. 307.

(74) **Records.** The record of a former trial and conviction is incompetent evidence against the accused on the second trial for the same offense. *Tully v. Com.*, 13 Bush 142. See *Clark v. Com.*, 14 Bush 166, and see *Com. v. Foster*, 3 Met. 1.

(75) The certificate of the Secretary of State of Ohio was held admissible to prove, with other evidence, that a bank in Ohio was legally incorporated. *Mount v. Com.*, 1 Duv. 90. But an incomplete record of divorce proceedings is incompetent to prove that a party indicted for bigamy has been divorced. *Davis v. Com.*, 13 Bush 318, and see *Faustre v. Com.*, 92 Ky. 34.

(76) On the trial of a person indicted for an illegal escape from the penitentiary, a certified copy of the judgment sentencing him to serve in the penitentiary was competent to prove that he was legally in custody. *Hudgens v. Com.*, 2 Duv. 239.

(77) **Res gestæ.** "Contemporaneous expressions or exclamations of the assailant, or of coadjutors, or of the deceased in cases of homicide, may be proved for the purpose of illustrating the character or quality of the act." *Bradshaw v. Com.*, 10 Bush 576. See *Sherley v. Billings*, 8 Bush 147; *Rutherford v. Com.*, 13 Bush 608. As to declarations of accused in his favor, see *Tipper v. Com.*, 1 Met. 6, and see *Terrell v. Com.*, 13 Bush 246.

(78) Cries or exclamations of bystanders in no way acting in concert with either of the parties to the transaction do not constitute part of the *res gestæ*, and are not competent. *Kaelin v. Com.*, 84 Ky. 354; 10 Bush 576; *Stroud v. Com.*,

14 R. 179; *Omer v. Com.*, 95 Ky. 353. The exclamations of persons as to who committed an offense are competent on the trial of persons charged with resisting an officer, who, when wounded, was attempting to make an arrest, and was aided in ascertaining the offender by the declarations of persons present. *Werner v. Com.*, 80 Ky. 387.

(79) **Separation of witnesses.** Permitting the Commonwealth's attorney to talk with the witnesses after they were sworn and separated did not prejudice the accused, as the same permission was granted to and exercised by his counsel. *Farris v. Com.*, 14 Bush 362.

(80) It is error to permit the prosecuting witness to remain in the court-room and testify, when the other witnesses are excluded, on a trial for murder. *Salisbury v. Com.*, 79 Ky. 425.

(81) It is proper to allow a witness for prosecution to remain in court-room after he has testified, if his presence will aid the Commonwealth's attorney. *Galloway v. Com.*, 7 R. 165; *Marcum v. Com.*, 8 R. 418; and where a witness remains in the court-room contrary to instructions and hears witnesses testify, court may reject or permit his testimony; and unless it appear that court abused its discretion its action will not be revised. *Haskins v. Com.*, 8 R. 419.

(82) **Slandorous words.** Proper to admit evidence of to reduce crime to manslaughter. *Massie v. Com.*, 15 R. 562.

(83) **Testimony on former trial—reproduction of.** When the witness has died since the former trial of the case, and his testimony on the former trial is reproduced, evidence that he had made statements since the former trial that his testimony then given was false is not competent. The rule that a witness can not be impeached until he has been inquired of concerning the statement applies. *Craft v. Com.*, 81 Ky. 250.

(84) "The law is that when the wit-

§ 225 [236] Instructions to be in writing. The court shall, on the motion

ness states that he remembers the substance of all the deceased witness testified to, both on the direct and cross-examination, he is a competent witness; and when the evidence is heard, if it does not clearly appear that the witness does not remember the substance of all that the deceased person testified to, the evidence should be permitted to go to the jury; but if it be manifest to the court that he does not so remember, the evidences should be rejected. The testimony of each witness must be tested by the same rule, and, if admissible, must stand by itself." *Bush v. Com.*, 80 Ky. 244.

(85) Where it is not shown that it is impossible to procure the attendance on the final trial of a witness who testified at the examining trial, it is not proper to permit others to recite his testimony on examining trial. *Dye v. Com.*, 3 Bush 3.

(86) The testimony of an absent witness on the former trial can not be proved unless the witness is dead. *Collins v. Com.*, 12 Bush 271; *O'Brian v. Com.*, 6 Bush 563.

(87) The written statement in the bill of exceptions of the testimony of a deceased witness on a former trial is not competent. *Kean v. Com.*, 10 Bush 190.

(88) **Testimony out of time.** Evidence in chief after close of testimony may be admitted for good cause, but in this case it was held error. *Williams v. Com.*, 90 Ky. 596; court has large discretion and unless manifestly abused its action will not be reversed. *Cargill v. Com.*, 93 Ky. 578; *Collins v. Com.*, 15 R. 691.

(89) **Threats.** It is competent for defendant to prove a threat made by deceased, although not in terms directed at him if all the circumstances show that it referred to him. *Sparks v. Com.*, 89 Ky. 644; but opinion of witness as to whom threats are directed at is not competent. *Johnson v. Com.*, 9 Bush 224.

(90) Evidence of general threats, not directed at any particular person, was held competent in *Whittaker v. Com.*, 13 R. 504; and see *Madison v. Com.*, 13 R. 313.

(91) Threats by deceased to kill mother

of accused were held competent in *Rutherford v. Com.*, 13 Bush 608.

(92) Threats by accused are competent to show malice. *Nichols v. Com.*, 11 Bush 575; but not under a manslaughter indictment. *Com. v. Matthews*, 89 Ky. 207.

(93) Uncommunicated threats are competent where it is material to show who began the difficulty. *Miller v. Com.*, 89 Ky. 653; *Hart v. Com.*, 85 Ky. 77; and where there is evidence of communicated threats it is competent to prove uncommunicated threats. *Cornelius v. Com.*, 15 B. M. 539.

(94) Accused may prove that a person then dead had told him a short time before homicide that deceased had threatened to kill him. *Carico v. Com.*, 7 Bush 124.

(95) **Venue of offense.** Verdict of conviction will not be disturbed, although there is no evidence showing county in which offense was committed. *Hays v. Com.*, 12 R. 611; *Com. v. Patterson*, 10 R. 167; and it is proper after Commonwealth has announced through, to permit evidence of venue. 10 R. 167.

§ 225. (1) Abstract instructions. It ought to appear, before an instruction containing merely an abstract proposition is made the sole ground of reversal, that it is at least probable that the prisoner may have been prejudiced by it. *Nichols v. Com.*, 11 Bush 575.

(2) The following instruction contains a mere abstract principle, and should not be given: "Where there is a conflict in the testimony of witnesses, the one side being of an affirmative and the other of a negative character, the affirmative character of the testimony is preferred, and is entitled to the greater weight by the jury in making up their verdict." *Lou. Chemical Works v. Com.*, 8 Bush 179.

(3) **Accomplice.** The court, in instructing the jury as to the weight that should be given to the evidence of an accomplice, should follow substantially section 241. *Craft v. Com.*, 80 Ky. 349.

(4) **After argument begun.** It is not improper to give additional or explanatory

of either party and before any argument to the jury, instruct the

instructions after the argument has commenced. *McDaniel v. Com.*, 6 Bush 326; *West v. Com.*, 14 R. 217.

(5) **Aiders and abettors.** It is error to say that defendant is guilty if he was present and "approved of" or "consented to" the killing, but it is proper to use the words "encourage, aid or abet" or the words "counsel, advise or assist." *True v. Com.*, 90 Ky. 651; *Omer v. Com.*, 95 Ky. 353; and see *Plummer v. Com.*, 1 Bush 76; *Chittenden v. Com.*, 10 R. 330.

(6) **Alibi.** As to proper instruction, see *Young v. Com.*, 8 Bush 366.

(7) **Assault and battery**—proper instructions. *Cornelison v. Com.*, 84 Ky. 583.

(8) **Assuming facts.** Instructions that assume as a fact certain propositions which are controverted, and that the jury have a right to determine, are erroneous. *Leiber v. Com.*, 9 Bush 11; *Berry v. Com.*, 10 Bush 15; *Edgerton v. Com.*, 7 Bush 142.

(9) **Bigamy.** For instructions concerning, see *Com. v. Jackson*, 11 Bush 679.

(10) **"Brought on difficulty"**—error to instruct jury that defendant can not avail himself of right of self-defense if he brought on difficulty. *Allen v. Com.*, 86 Ky. 643.

(11) Where right of self-defense is attempted to be denied because of the fault of the accused the jury should be instructed that they must believe beyond a reasonable doubt accused was in fault. *Allen v. Com.*, 86 Ky. 643; *Riley v. Com.*, 94 Ky. 266; *Cockrill v. Com.*, 95 Ky. 22.

(12) If one by his own wrongful act makes the harm or danger to himself necessary or excusable he can not rely on plea of self-defense, but words spoken in jest or acts not intended or calculated to provoke can not deprive accused of right of self-defense, although they may have caused difficulty. *Allen v. Com.*, 86 Ky. 643; *Wilcoxon v. Com.*, 15 R. 261; *Combs v. Com.*, 15 R. 659.

(13) **Character of accused.** It is proper where character of accused has been impeached to say to jury that "evidence of his bad character is admitted only to affect his credibility as a witness and for no

other purpose." *Hasson v. Com.*, 10 R. 1054; and see note 41.

(14) **Circumstantial evidence** "should be left, like direct or positive evidence, to be considered by the jury, and to have such weight as they deem it entitled to, without caution or suggestion on the part of the court as to its value or the necessity to scrutinize it closely." *Brady v. Com.*, 11 Bush 282.

(15) **Confessions.** It is error to instruct the jury, on the trial of one charged with murder, that if they believe the accused confessed the killing, they ought to find him guilty (*Butler v. Com.*, 2 Duv. 435); or to assume in an instruction that a confession has been made. The jury should be left to determine from the evidence whether or not any confession of guilt has been made. *Cunningham v. Com.*, 9 Bush 149.

(16) An instruction in the language of sec. 240 is held to be proper in *Wigginton v. Com.*, 92 Ky. 282.

(17) **Consequences of his own acts.** Instruction in murder case that a sane man intends probable consequences of his own acts deliberately done erroneous. *Rogers v. Com.*, 16 R. 199.

(18) **Correction of instruction**, after verdict has been announced and while jury is being polled, is error. *Roberts v. Com.*, 90 Ky. 654.

(19) **Deadly weapon**—instruction defining. *Evans v. Com.*, 11 R. 551.

(20) **Deadly weapon**—what is, under an indictment for striking or injuring with, is a question that should be left to jury if there is room for doubt as to the whether it was or not a deadly weapon. *Com. v. Duncan*, 91 Ky. 592.

(21) **Defense of dwelling.** Proper instructions. *Wright v. Com.*, 85 Ky. 123; *Sparks v. Com.*, 89 Ky. 644; *Estep v. Com.*, 86 Ky. 39.

(22) **Defense of others.** Proper instructions in cases of killing in defense of another. *Stanley v. Com.*, 86 Ky. 440; *Chittenden v. Com.*, 10 R. 330.

(23) **Drunkenness.** The jury should not be told that drunkenness mitigates the offense. *Shannahan v. Com.*, 8 Bush 463, expressly overruling *Smith v. Com.*,

jury on the law applicable to the case, which shall always be given in writing.

1 Duv. 224; Blimm v. Com., 7 Bush 320; and impliedly overruling Golliher v. Com., 2 Duv. 163; Curry v. Com., 2 Bush 67.

(24) Not proper to give insanity instruction where accused was merely drunk when he committed crime. Wilkerson v. Com., 88 Ky. 29; 86 Ky. 110; nor is it proper to single out from the evidence the fact of drunkenness and tell the jury why they are permitted to hear evidence bearing upon it. Buchanan v. Com., 86 Ky. 110; as to defense of drunkenness in crimes that a felonious intention is an essential ingredient of, as robbery, see Keeton v. Com., 92 Ky. 522.

(25) **Erroneous instruction—failure to properly instruct.** Although jury found defendant guilty of manslaughter, when under the instructions they should have found him guilty of murder or acquitted, did not cure the error in failing to give manslaughter instruction. Campbell v. Com., 88 Ky. 402.

(26) **Former convictions**—proper instructions where indictment charges former convictions. Rector v. Com., 80 Ky. 468.

(27) **Grouping facts.** Prominent facts should not be grouped together in an instruction. Williams v. Com., 9 Bush 274; and see Elswick v. Com., 13 Bush 155. Nor should an attempt be made to enumerate the collateral facts which the evidence tended to prove. "Instructions ought, as a general rule, to be based only upon such facts as must be found by the jury in order to establish guilt or to make out a defense." Coffman v. Com., 10 Bush 495.

(28) **Incompetent evidence cured by.** Evidence that the defendant had sold liquor on a Sunday subsequent to the date of the warrant was incompetent; but the error in admitting it was cured by an instruction that unless the jury believed from the evidence that the defendant sold liquor on Sunday within the time covered by the warrant, they must acquit him. Megowan v. Com., 2 Met. 3. Where incompetent testimony was admitted, an

(31)

instruction telling the jury to disregard such evidence "except so far as it harmonized with facts afterward developed" did not cure the error. Dye v. Com., 3 Bush 3.

(29) **Instruction to be based on evidence.** When there is no testimony showing that the homicide was committed in self-defense it is not necessary to give any instruction on that question. Fitzpatrick v. Com., 81 Ky. 357; Slagel v. Com., 81 Ky. 485.

(30) **"Impending danger."** If accused, when killing occurs, believes and has reasonable grounds to believe that danger to him is impending and that there is no other apparent means of escape, then he may strike in self-defense. Coffman v. Com., 10 Bush 495; Radford v. Com., 9 R. 378; and see Kennedy v. Com., 14 Bush 340.

(31) **Insanity.** Defense of need only be sustained by a preponderance of the evidence. Moore v. Com., 92 Ky. 630; Ball v. Com., 81 Ky. 662; and see Graham v. Com., 16 B. M. 587; Scott v. Com., 4 Met. 227.

(32) Where the evidence only showed that the defendant was illiterate, ignorant and passionate, the court properly refused to instruct the jury on the question of insanity. Fitzpatrick v. Com., 81 Ky. 357.

(33) Instruction that where accused was insane before committing crime (the law presumes him insane when he commits it) is not proper even where the prior insanity has been established by an inquisition. Montgomery v. Com., 88 Ky. 509.

(34) See statements of facts authorizing insanity instruction where person accused was an infant. McClure v. Com., 81 Ky. 448.

(35) **Involuntary manslaughter**—instruction as to should be given when no witness saw homicide committed or the parties on occasion when killing occurred. Rutherford v. Com., 13 Bush 608.

(36) See, for facts authorizing such an instruction, Smith v. Com., 93 Ky.

§ 226. Jury to withdraw during argument on instructions. On motion of

318; and Bush v. Com., 78 Ky. 268; Com. v. Matthews, 89 Ky. 287; Smith v. Com., 93 Ky. 318.

(37) Involuntary manslaughter—definition of. Conner v. Com., 13 Bush 714; Trimble v. Com., 78 Ky. 176.

(38) Jury should accept instructions as law of the case, and although they have the power they have not the right to disregard the law as expounded to them by the court. Com. v. Van Tuyl, 1 Met. 1.

(39) Law of whole case. Duty of court to give, even in the absence of a request. Cook v. Com., 10 R. 222; Trimble v. Com., 78 Ky. 176; Heilman v. Com., 84 Ky. 457.

(40) Less punishment than statute fixed—instruction prescribing not prejudicial. Logsdon v. Com., 9 R. 431.

(41) Limiting effect of testimony. Where testimony is only competent for the purpose of contradicting the evidence of other witnesses the jury should be so instructed. Fenston v. Com., 91 Ky. 230; Collins v. Com., 15 R. 691.

(42) Malice. It is error to instruct the jury that "malice is implied by the law from any cruel and unnecessary act done by one person to another, and from the deliberate and unnecessary use of a deadly weapon." The jury may infer malice from the circumstances of the killing, but an instruction telling them that they may infer malice from certain acts is erroneous. Farris v. Com., 14 Bush 362; and see Buckner v. Com., 14 Bush 601; Trimble v. Com., 78 Ky. 176; Bush v. Com., 78 Ky. 268; Salisbury v. Com., 79 Ky. 425.

(43) Instruction defining malice as a "predetermination to do the act without lawful excuse, it being immaterial how suddenly or recently this predetermination is formed" is proper. Armstrong v. Com., 15 R. 344.

(44) Manslaughter. "It is not the province of the lower court to weigh evidence for the purpose of determining whether a person on trial for his life is entitled to an instruction as to manslaughter. If there is any evidence tending to show the homicide is of the degree of manslaughter the accused is entitled to an

instruction upon that hypothesis." Bowlin v. Com., 94 Ky. 391.

(45) Means of escape. The question is not whether the jury believe that defendant had no safe means of escape; they should be instructed that if *defendant believed* that he had no safe means of escape. Oakley v. Com., 10 R. 885.

(46) Murder—manslaughter—involuntary manslaughter. Where the indictment is for murder the accused may be convicted of any degree of homicide as fixed by the common law, viz., Murder, voluntary manslaughter or involuntary manslaughter, and the court should, under an indictment for murder or voluntary manslaughter, when the facts justify it, instruct the jury as to involuntary manslaughter. Buckner v. Com., 14 Bush 601; Bush v. Com., 78 Ky. 268. But when there is no evidence showing the existence of facts constituting involuntary manslaughter an instruction as to it should not be given. York v. Com., 82 Ky. 360; Mitchell v. Com., 78 Ky. 219.

(47) When no witness saw the homicide committed, or the parties on the occasion when the killing occurred, the law applicable to murder, manslaughter and involuntary manslaughter should be given in order to meet any state of facts the jury may find from the circumstances in evidence to have existed. Rutherford v. Com., 13 Bush 608.

(48) Under an indictment for murder or manslaughter, an instruction as to the statutory offense defined in sec. 2, art. 4, chap. 29, Gen. Stat. [now Ky. Stat., sec. 1151], is not proper. Trimble v. Com., 78 Ky. 176; Buckner v. Com., 14 Bush 601; Conner v. Com., 13 Bush 714.

(49) Murder to manslaughter—provocation that will reduce "must be such as was ordinarily calculated to excite the passions beyond control," and it is proper to give an instruction in these terms. Lewis v. Com., 93 Ky. 238; Campbell v. Com., 88 Ky. 402; Cottrell v. Com., 13 R. 305.

(50) It is improper to say that the provocation that will reduce murder to manslaughter must be "considerable provocation." Lewis v. Com., 93 Ky.

either party, the court shall cause the jury to withdraw from the

238; *Slaughter v. Com.*, 15 R. 230; or "legal provocation." *Payne v. Com.*, 1 Met. 370; *Donnellan v. Com.*, 7 Bush 676; or to say that "mere words, however opprobrious or insulting, are not sufficient provocation to reduce a killing from murder to manslaughter." *Com. v. Hourigan*, 89 Ky. 305.

(51) **Mutual rencontre.** As to instructions in cases of mutual rencontre, both parties being in fault at the commencement of the difficulty, or where it is uncertain which commenced it, see *Smaltz v. Com.*, 3 Bush 32; *Berry v. Com.*, 10 Bush 15; *Luby v. Com.*, 12 Bush 1; *Bohannon v. Com.*, 8 Bush 481; *Minton v. Com.*, 79 Ky. 461; *Terrell v. Com.*, 13 Bush 246.

(52) **Negligence**, resulting in injury or death, proper instructions. *Com. v. Matthews*, 89 Ky. 287.

(53) **Officer—killing of.** As to instructions, where the accused is charged with killing an officer, see *Mockabee v. Com.*, 78 Ky. 380; *Fleetwood v. Com.*, 80 Ky. 1. The instructions given in these cases are set out in full in the opinions.

(54) Where an officer, in attempting an arrest of one who knows him to be an officer, is killed, it is murder and the jury need not be told that killing must have been malicious. *Dilger v. Com.*, 88 Ky. 550.

(55) **Oral instructions.** The Code requires that all instructions shall be written, and no departure from this rule can be tolerated; verbal instructions are not cured by subsequently reducing them to writing and handing writing to jury. *Payne v. Com.*, 1 Met. 370; nor should the court orally state to the jury the effect of testimony. *Luby v. Com.*, 12 Bush 1; or make any statement in presence of jury of the reasons for decisions upon questions that might prejudice the rights of the accused. *Coppage v. Com.*, 3 Bush 532; *Kennedy v. Com.*, 14 Bush 340.

(56) **Presumption that instruction prejudicial.** "The correct rule, we think, is that every improper instruction should be taken as *prima facie* prejudicial to the accused, subject of course to be shown

otherwise by the evidence in the case." *Barnett v. Com.*, 84 Ky. 449; *Brooks v. Com.*, 16 R. —; but in *Galloway v. Com.*, 7 R. 163, the court held that erroneous instruction as to murder was not prejudicial when defendant was found guilty of manslaughter.

(57) **Prolx instructions.** In *Smith v. Com.*, 1 Duv. 224, thirty-six instructions were given, and the court intimates that this great number of instructions would be cause of reversal; and see, to same effect, *Moore v. Com.*, 7 Bush 191.

(58) The court should confine the instructions as closely as possible to the essential facts necessary to make out the charge or defense. *Brady v. Com.*, 11 Bush 282; and they should be based only on such facts as must be found by the jury in order to establish the guilt of the accused or make out his defense. *Coffman v. Com.*, 10 Bush 495.

(59) **Protection and defense of family**—instructions applicable. *Campbell v. Com.*, 88 Ky. 402; *Estep v. Com.*, 86 Ky. 39.

(60) **Provocation.** "Mere words or gestures, though they may excite passion, do not constitute such provocation as will of itself extenuate a homicide, committed with a deadly weapon, and make it manslaughter." *Rapp v. Com.*, 14 B. M. 614; and see *Donnellan v. Com.*, 7 Bush 676; *Payne v. Com.*, 1 Met. 370; *Williams v. Com.*, 80 Ky. 313; *Oder v. Com.*, 80 Ky. 32; *Coffman v. Com.*, 10 Bush 495.

(61) But see notes 49, 50 to this section modifying rule above stated.

(62) **Rape.** As to instructions in prosecutions for, see *Bethel v. Com.*, 60 Ky. 526; *Heilman v. Com.*, 84 Ky. 457; *Kessler v. Com.*, 12 Bush 18; as to degrees of offense and proper instructions as to, see *Bethel v. Com.*, 80 Ky. 526; *Fenston v. Com.*, 82 Ky. 549; *Young v. Com.*, 16 R. 496.

(63) **Woman, insane or an imbecile**, proper instruction. *Higgins v. Com.*, 84 Ky. 54.

(64) **Reasonable doubt.** See notes to secs. 238, 239.

(65) **Reckless use of fire-arms.** See *York v. Com.*, 82 Ky. 360; *Chrystal v. Com.*, 9

court-room, during any argument upon the law to be embodied in the instructions.

Bush 669; Goliher v. Com., 2 Duv. 163; Sparks v. Com., 3 Bush 111; Smith v. Com., 93 Ky. 318.

(66) **Retreat not necessary** by one summoned to aid an officer. Cockrill v. Com., 95 Ky. 22.

(67) **Rights of accused on his own premises.** Proper instructions. Baker v. Com., 93 Ky. 302; Tingle v. Com., 11 R. 224; Bledsoe v. Com., 9 R. 1002; Smith v. Com., 16 R. 112; Eversole v. Com., 95 Ky. 623.

(68) **Right to prevent intruder from entering house.** Proper instructions. Sparks v. Com., 89 Ky. 644; 85 Ky. 123; Estep v. Com., 86 Ky. 39.

(69) **Self-defense.** As to proper instructions in cases where, at the time the difficulty occurs, the accused is about to be, or is, assailed by the deceased, and believes, and has reasonable grounds to believe, he is in danger of death or great bodily harm, see Rapp v. Com., 14 B. M. 614; Meridith v. Com., 18 B. M. 49; Young v. Com., 6 Bush 312; Holloway v. Com., 11 Bush 344; Smaltz v. Com., 3 Rush 32; Lightfoot v. Com., 80 Ky. 516; Munday v. Com., 81 Ky. 233; Kennedy v. Com., 14 Bush 340; Minton v. Com., 79 Ky. 461.

(70) Where the defense is self-defense, the question is not "whether the means used by a defendant to protect himself from impending danger *were in the opinion of the jury necessary, but whether they appeared at the time to the defendant himself* to be necessary for that purpose, and the instruction on this point should be so clear and explicit that there can be no doubt in the minds of the jury." Amos v. Com., 16 R.—; Cockrill v. Com., 95 Ky. 22.

(71) **Slanderous words** sufficient provocation to reduce crime to manslaughter. Massie v. Com., 15 R. 562; Stott v. Com., 16 R.—

(72) **Special finding.** By the special findings the jury were instructed to find whether the facts submitted to them were established by a *preponderance* of the evidence. The court say: "The

instructions for special findings as presented are not authorized by the Code, and are contrary to the theory of criminal jurisprudence." Maiden v. Com., 82 Ky. 133.

(73) **Statutory offenses.** An instruction in a penal case, although it pursues very closely the language of the statute, may be erroneous. It should be so explicit and have such connection with the facts of the case as to enable the jury clearly to apply the facts to the law as expressed in the instruction and meet the evil intended to be remedied. Ritte v. Com., 18 B. M. 35.

(74) **Surgical operation—death ensuing.** See Coffman v. Com., 10 Bush 495; Bush v. Com., 78 Ky. 268.

(75) **Threats and assault prior to killing.** As to instructions when there have been threats followed by an assault prior to the day of the homicide, see Bohannon v. Com., 8 Bush 481; Holloway v. Com., 11 Bush 344; Phillips v. Com., 2 Duv. 328; Carrico v. Com., 7 Bush 124; Oder v. Com., 80 Ky. 32; Parsons v. Com., 78 Ky. 102; and see Kennedy v. Com., 14 Bush 340.

(76) **Threats unexecuted.** As to instructions in cases in which threats were made previous to the day the homicide occurred, unaccompanied by any attempt to execute them, see Carrico v. Com., 7 Bush 124; Bohannon v. Com., 8 Bush 481; Young v. Com., 6 Bush 312; Oder v. Com., 80 Ky. 32; Parsons v. Com., 78 Ky. 102; Kennedy v. Com., 14 Bush 340.

(77) **Threats of deceased to take life of accused.** See for statement of facts authorizing an instruction presenting this view of case as a defense. Oder v. Com., 80 Ky. 32; Haverly v. Com., 95 Ky. 33; Com. v. Barnes, 13 R. 163.

(78) **Voluntary manslaughter—definition of.** Conner v. Com., 13 Bush 714; and the court should in an instruction define offense. Com. v. Blackwell, 93 Ky. 309.

(79) **Willful striking.** Under an indictment for murder the accused can not be convicted of the offense described in

§ 227 ^[224] **Order of argument.** Unless the case be submitted to the jury without argument, the defendant or his counsel shall commence, and the counsel for the Commonwealth conclude, the argument to the jury, unless the defendant's only plea be a former conviction or acquittal, when the order of argument shall be reversed.

§ 228 ^[226] **Arguments to alternate.** If more than one counsel on each side argue the case they shall do so alternately.

§ 229 ^[227] **Defendant to remain in custody during felony trial.** During the trial of an indictment for felony, the defendant shall be committed to and remain in the custody of the proper officer. (*But see sec. 183.*)

§ 230 ^[228] **Proceedings if offense committed out of jurisdiction.** If, during

sec. 2, art. 4, chap. 29, Gen. Stat. [now Ky. Stat., sec. 1151], and where the jury are instructed under that statute, and the verdict of conviction is found under that instruction, the accused should be discharged. *Conner v. Com.*, 13 Bush 714, overruling *Terrell v. Com.*, 13 Bush 246, so far as it conflicts with this opinion.

(80) **Witnesses.** An instruction that "the jury are the sole judges for themselves of the weight of the testimony and credibility of the witnesses, and may attach such weight to any and all parts thereof as they may think proper, and if they believe that any witness or witnesses have willfully sworn falsely as to any material fact, they may, if they deem proper, disregard the entire testimony of such witness or witnesses" is erroneous. *Barnett v. Com.*, 84 Ky. 449; *Barnard v. Com.*, 10 R. 143; and should not be given, but the court will not reverse for this error if it is not prejudicial. *Forman v. Com.*, 86 Ky. 605; and it is error to direct attention to the interest of witnesses or the character of their statements. *Wright v. Com.*, 85 Ky. 123.

§ 227. (1) **Argument.** As to the power of the trial court to limit the argument, the court say: "The argument of a case may be reasonably limited, but where the liberty or life of the citizen is involved it is a power to be carefully exercised. It would, perhaps, be best in capital cases that this power should never be exercised, or, if so, only under peculiar and extraordinary circumstances." In this case the argument was limited to five

minutes, but the court declined to interfere because a proper exception was not taken to the ruling of the court. *Williams v. Com.*, 82 Ky. 640; *Sewell v. Com.*, 3 R. 86.

(2) **Improper argument.** Commonwealth's attorney is not excusable in making any statement of facts outside of the evidence which may in the slightest degree prejudice the rights of the accused. *Cook v. Com.*, 86 Ky. 663; nor should he be allowed to make any statement in conflict with the instructions or ruling of the court. *Bates v. Com.*, 13 R. 132; and it is improper for the attorney to read from books or a paper definitions of malice. *Duncan v. Com.*, 13 R. 195; but when the attention of the court is called to the improper argument and the jury are admonished not to regard it the court will not reverse on this ground. *Cotrell v. Com.*, 13 R. 305; *Hilton v. Com.*, 13 R. 158; *Handly v. Com.*, 15 R. 736; and see *Cupp v. Com.*, 87 Ky. 35.

(3) A verdict will not be set aside on account of misconduct of attorney in argument where the trial is in other respects fairly conducted and it is apparent that no other verdict could have been rendered. *Hourigan v. Com.*, 94 Ky. 520; nor will Court of Appeals consider objection on account of improper argument unless an objection is taken to it at the time it is being made. *O'Brien v. Com.*, 89 Ky. 354.

§ 229. **Custody of accused during felony trial.** See notes to sec. 183.

§ 230. **Evidence of venue of crime** should be permitted even after Commonwealth

the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this State, the court shall stop the trial, discharge the jury, and take the proceedings in the case directed in sections one hundred and sixty-six and one hundred and sixty-seven.

§ 231 [229] **Proceedings if offense committed out of State.** If it appear that the offense was committed out of the State, the trial shall be stopped, and the defendant shall be either discharged or ordered to be retained in custody for a reasonable time, until the counsel for the Commonwealth shall have an opportunity to inform the chief executive officer of the State in which the offense was committed of the facts, and for said officer to require the delivery of the offender.

§ 232 [230] **Proceedings if higher grade of offense proven.** If, during the trial, the court shall be of opinion that the facts proved constitute an offense of a higher nature than that charged in the indictment, it may direct the jury to be discharged, and all proceedings to be suspended, until the case can be re-submitted to a grand jury, and may order the defendant to be committed, or admit him to bail, to answer any new indictment which may be found against him for the highest offense. If an indictment be not found for the higher offense before the next grand jury are discharged, the court must proceed to try the defendant on the original indictment. (*Degrees of offenses and provisions concerning, secs. 262 to 266.*)

§ 233 [231] **Indictment may be quashed—resubmission.** If, during the trial, the court be of opinion that the facts charged in the indictment do not constitute an offense punishable by law, it shall order the jury to be discharged and the indictment to be quashed, and thereupon may take the proceedings directed in section one hundred and seventy.

§ 234 [232] **Joint defendants, testimony of, for each other.** If two or more persons be jointly indicted for the same offense, each shall be a competent witness for the others, unless the indictment charge a conspiracy between them. (*This section repealed by act 1894.*)

has closed its case for the purpose of showing what court had jurisdiction. *Com. v. Patterson*, 10 R. 167; and see *Hays v. Com.*, 12 R. 611.

§ 233. **Discharge of jury** when operates as an acquittal. See notes 7-11 to sec. 176.

§ 234. (1) **Charge of conspiracy** to commit offense with which two or more persons are charged only aggravates offense and does not render indictment open to

objection that two offenses are stated. *Salisbury v. Com.*, 79 Ky. 425.

(2) **Conspiracy.** What was said or done by one of two conspirators after the commission of the offense not in the presence of or approved by the other is not competent evidence against him. *Shelby v. Com.*, 91 Ky. 563; but declarations or acts before object of conspiracy is accomplished are competent. *Miller v. Com.*, 78 Ky. 15.

§ 235 [232] **Questions of law to be decided by court.** All questions of law arising during the trial shall be decided by the court, and the jury shall be bound to take the decisions of the court on points of law, as the law of the case.

§ 236 [234] **View of place offense committed.** When, in the opinion of the court, it is necessary that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers [and accompanied by the judge, prisoner and counsel for each side] to the place, which must be shown to them by the judge, or by a person appointed by the court for that purpose. The officers must be sworn to suffer no person to speak to, or communicate with, the jury on any subject connected with the trial, nor do so themselves, but shall merely show the place to be viewed, and return them into court without unnecessary delay, or at a specified time. (*Words in brackets inserted by act of 1882.*)

§ 237 [235] **Joint defendants, in felony, entitled to separate trial.** If two or more defendants be jointly indicted for a felony any defendant is entitled to a separate trial.

(3) **Observe that this section has been repealed.** Does its repeal, taken in connection with fact that defendant can testify for himself, authorize joint defendants to testify for each other in all cases? and see *Adwell v. Com.*, 17 B. M. 311; and *Averbeck v. Hall*, 14 Bush 505.

(4) **Right of State to introduce one defendant against others.** It is suggested, but not decided, in *Downard v. Com.*, 13 R. 472, that before this can be done there must either be a verdict of acquittal or a *nolle prosequi* entered as to witness. In *Sizemore v. Com.*, 10 R. 1, two persons jointly indicted with accused were introduced for Commonwealth after dismissal of indictment against them.

(5) **Witnesses—conspirators.** If a conspiracy is charged in the indictment, and the proof sustains the charge, a co-defendant will not be permitted to testify in behalf of the defendant. *Cummings v. Com.*, 81 Ky. 465.

(6) Defendants jointly indicted are competent witnesses for each other, although a conspiracy is charged in the indictment, unless there is such evidence as in the opinion of the court establishes

with reasonable certainty the existence of the alleged conspiracy. *Christian v. Com.*, 13 Bush 264; *Laughlin v. Com.*, 13 Bush 261; 84 Ky. 237.

(7) The act of May 1, 1886, allowing defendants in criminal cases to testify does not change the rule determining the competency of defendants jointly indicted as witnesses, nor give the court the right to arbitrarily exclude them. *Jeffries v. Com.*, 84 Ky. 237.

§ 235. **Jury to obey instructions.** The court has the right to instruct the jury as to the law of the case, and it is their duty to regard such instructions as containing the law; but if they disregard them in a criminal case and acquit the accused, the judge can not for that reason grant a new trial. *Com. v. Van Tuyl*, 1 Met. 1.

§ 236. **View of place by jury.** Pointing out to jury place where offense was committed is the giving of evidence and should not be done in absence of accused. *Rutherford v. Com.*, 78 Ky. 639; whether jury should be sent to view premises is a matter in discretion of trial court. *Roberts v. Com.*, 94 Ky. 499; and it is not material at whose sug-

§ 238 ^[236] **Reasonable doubt entitles defendant to acquittal.** If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal.

§ 239 ^[237] **Conviction to be of lower, if doubt as to degree.** If there be a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree. (*Degrees of offenses defined, sec. 263.*)

§ 240 ^[238] **Confession out of court must be corroborated.** A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed.

gestion jury are permitted to view place. Austin v. Com., 4 R. 29.

§ 238. (1) **Reasonable doubt — instructions.** "A rational doubt is one growing out of the evidence, and not a mere chimaera existing in the juror's mind." Graham v. Com., 16 B. M. 587.

(2) In giving an instruction as to reasonable doubt, "it seems to this court that the better practice is to follow as nearly as practicable the language of the Criminal Code" as expressed in this section. Mickey v. Com., 9 Bush 593; Ward v. Com., 14 Bush 233. The following instruction was approved: "If the jury, on all the evidence, entertain a reasonable doubt of the guilt of the defendant, or of any fact necessary to make out his guilt, they should acquit him; or if they find him guilty, and entertain a reasonable doubt whether his crime be murder or manslaughter, they should find him guilty only of manslaughter." Brady v. Com., 11 Bush 282; Payne v. Com., 1 Met. 370.

(3) This section applies in all criminal prosecutions. Sowder v. Com., 8 Bush 432.

§ 239. **Doubt as to degree of offense—instructions.** "Whenever there is evidence introduced which might be calculated to raise a reasonable doubt of the degree of the guilt of the accused, the jury should be instructed in pursuance of the provision of the Code just quoted" (sec. 239). Williams v. Com., 80 Ky. 313.

§ 240. (1) **Confessions.** "Proof of confessions of a party in the presence of the witness *only*, or of him and the adverse party, although certainly competent

testimony, ought to be weighed with caution, because it is impossible for the party to counteract it by other testimony, because the expressions used are easily misunderstood or perverted, either through mistake or design, and because not the whole conversation, but only parts of it, are generally detailed by the witness. It is the most dangerous species of testimony held competent by the law." Becker v. Crow, 7 Bush 198.

(2) "It is a general rule that confessions, which are induced by hopes or fears raised by the promise or threats of the prosecutor or of any person having authority over the prisoner at the time, are not considered voluntary, but as having been made under mental duress, and therefore not competent." Rector v. Com., 80 Ky. 468. See Rutherford v. Com., 2 Met. 387; Young v. Com., 8 Bush 366; Butler v. Com., 2 Duv. 435; Hudson v. Com., 2 Duv. 531; but confessions procured by deception are competent. Wiggington v. Com., 92 Ky. 282.

(3) Although confessions improperly obtained are not admissible, yet any facts which have been brought to light in consequence of such confessions may be properly received in evidence; as the discovery of a hidden vial containing poison, charged to have been administered by the accused to the deceased. Jane v. Com., 2 Met. 30; Rector v. Com., 80 Ky. 468.

(4) Whether the facts prove that a confession has been extorted by duress or not is a question of law for the court,

§ 241 (231) **Testimony of accomplice must be corroborated.** A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was committed, and the circumstances thereof.

and not the jury, to decide. *Hudson v. Com.*, 2 Duv. 531.

(5) "The whole of what the prisoner said on the subject at the time of making the confession should be taken together. If one part of a conversation is relied on as proof of a confession of the crime the prisoner has a right to lay before the court the whole of what was said in that conversation; not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion relative to the subject matter in issue. If the witness called to prove the confession of the prisoner says he does not remember all the conversation, and that a great many things were said in the conversation which he did not remember," and he does not state that he remembers the substance of *all* that was said, his testimony should be excluded. *Berry v. Com.*, 10 Bush 15. See *Coffman v. Com.*, 10 Bush 495.

(6) Statements of a woman in prosecution for detaining her, showing that she was a willing party, do not amount to a confession. *Cargill v. Com.*, 93 Ky. 578.

(7) "The manifest meaning of section 240 (238) is, that besides the proof of any confession a defendant may have made of his guilt, unless made in open court, there must, to warrant a conviction, be other evidence conducing to prove him guilty of the offense alleged, or in other words, to show that such an offense has been committed, and not inconsistent with his guilt, and not merely some 'other testimony' which might have no tendency whatever to establish the charge." *Cunningham v. Com.*, 9 Bush 149, but in *Wigginton v. Com.*, 92 Ky. 282, this case is criticised and it is held that it is sufficient cor-

roboration if there is other evidence that such an offense was committed.

(8) **Instruction in the language of this section is proper.** 92 Ky. 282, impliedly overruling *Cunningham v. Com.*, 9 Bush 149; and *Patterson v. Com.*, 86 Ky. 313.

§ 241. (1) **Accomplice—evidence.** An accomplice is one of several equally concerned in the commission of a felony. A conviction can not be had on the testimony of an accomplice unless corroborated by other evidence, and the corroboration must extend to every fact necessary to establish the fact that the offense charged was committed, and that the prisoner was the perpetrator. *Miller v. Com.*, 78 Ky. 15.

(2) If two or more accomplices are produced as witnesses they are not deemed to corroborate each other. The wife of an accomplice who has testified against the accused may be introduced as a witness to corroborate the testimony of her husband. *Blackburn v. Com.*, 12 Bush 181; and see *Smith v. Com.*, 13 R. 369.

(3) "The uncorroborated testimony of an accomplice is wholly insufficient to convict the accused of a crime, or of any of its constituent elements, or to render admissible any confessions or admissions of the parties which depend upon and must be preceded by evidence of a conspiracy unless other evidence besides that of the accomplice is produced tending to prove a conspiracy, and connect the accused therewith, and evidence merely showing that the offense was committed and the circumstances thereof is as insufficient for that purpose as it would be to connect the accused with the commission of the offense itself." *Bowling v. Com.*, 79 Ky. 604.

(4) Under an indictment for murder caused by an abortion a conviction may be had on the statements of the deceased

§ 242 ^[344] **Instruction to acquit if corroboration not sufficient.** In all cases where, by law, two witnesses, or one witness with corroborating circumstances, are requisite to warrant a conviction, if the requisition be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, by which instruction they are bound.

§ 243 ^[341] **Attorney may dismiss indictment—effect of.** The attorney of the Commonwealth, with permission of the court, may, at any time before the case is finally submitted to the jury, dismiss the indictment as to all or a part of the defendants, and such dismissal shall not bar a future prosecution for the same offense. (*See further, as to dismissal of indictment, secs. 159, 170, 178.*)

alone, as she is not an accomplice. *Peoples v. Com.*, 87 Ky. 487.

(5) Under indictment for incest, a conviction may be had alone upon testimony of woman. *Whitaker v. Com.*, 16 R. 173.

(6) One jointly indicted with others will not be permitted to prove the good character of persons indicted with him. *Omer v. Com.*, 95 Ky. 353.

(7) The mere fact that a person is charged with crime in connection with others does not make him an accomplice; in order to make him an accomplice it is necessary that his criminal participation in the crime charged should be shown by the evidence. *Sizemore v. Com.*, 10 R. 1.

(8) **Acquittal if corroboration not sufficient.** *Smith v. Com.*, 13 R. 369; *Craft v. Com.*, 80 Ky. 349.

(9) **Instructions.** "Where there are no corroborating circumstances it is the duty of the court to instruct the jury to acquit. Before the jury can consider the evidence of an accomplice as a factor in the problem of guilt or innocence, they must first determine that the other evidence heard proves the existence of the corroborating facts. If the evidence claimed to be corroborative does not tend, when its truth is admitted, to this end, it is the duty of the court to exclude it and to direct an acquittal." *Craft v. Com.*, 80 Ky. 349.

(10) The jury should be instructed in the language of this section. *Craft v. Com.*, 80 Ky. 349; *Patterson v. Com.*, 86 Ky. 313; *Taylor v. Com.*, 10 R. 169.

§ 243. (1) **Dismissal of indictment—unconstitutional.** After the evidence for the Commonwealth and accused had been heard, the court, on motion of the Commonwealth's attorney, dismissed the indictment, which was for larceny, and the case being resubmitted to the grand jury, another indictment was found against the accused, the same as the first one, except that it charged that the property stolen belonged to A and B, the first one charged that it belonged to A. The defendant's plea of former acquittal to the indictment should have been sustained. The court say: "We are of opinion that secs. 242, 252 of the Criminal Code, in so far as they attempt to authorize after jeopardy attaches the dismissal of an indictment for felony so that it may not operate as a bar to a future prosecution for the same offense, are unconstitutional." *Williams v. Com.*, 78 Ky. 93; *Robinson v. Com.*, 88 Ky. 386.

(2) Consent of accused to discharge of jury is a waiver of his right to plead trial in bar of subsequent prosecution. 88 Ky. 386.

(3) The indictment may be dismissed at any time before trial begins, and it is not necessary that Commonwealth's attorney should file a written statement when purpose is to resubmit case to grand jury. *Dilger v. Com.*, 88 Ky. 550.

(4) Where the accused was granted on his motion a new trial the indictment under which he was tried may be dismissed and a new indictment found. *Wells v. Com.*, 9 R. 658.

(5) See further, notes to sec. 176 as to

§ 244 [242, 243] **Cases in which jury must be kept together.** On the trial of offenses which are or may be punished capitally the jurors, after they are accepted, shall not be permitted to separate, but shall be kept together, in charge of the proper officers. On the trial of other felonies the jurors, before the case is submitted to them, may be permitted to separate, in the discretion of the court, but after the case is submitted they shall be kept together in charge of an officer. On the trial of misdemeanors the jurors may be permitted to separate, at any time until finally discharged, or the court may order them to be kept together. (*See sec. 251, as to discharge of jury.*)

§ 245 [242] **Officers in charge of jury to be sworn.** When a jury is kept together in charge of officers, the officers must be sworn to keep the jurors together, and to suffer no person to speak to, or communicate with, them on any subject connected with the trial, and not to do so themselves.

§ 246 [242] **Admonition of court to jury.** The jury, whether permitted to separate or kept in charge of officers, must be admonished by the

when dismissal of indictment or discharge of jury operates as an acquittal.

§ 244. (1) **Keeping jury together.** An alleged error in not keeping the jury together being objected to for the first time in the motion for a new trial can not be considered by the Court of Appeals. *Kennedy v. Com.*, 14 Bush 340.

(2) "It is the duty of the sheriff to comply with the requirements of the Code, both in keeping the jury together and in not suffering any person to speak to or communicate with them on any subject connected with the trial. A substantial performance of this duty certainly required the jury to be so kept as in fact to be present with each other, whether in the same or adjoining and connected apartments, so situated as to admit of free and unrestricted communication between them; and the officer should himself have remained in such convenient situation as to observe and prevent any attempt to tamper with the jury, or any irregularity on their part; but it was not, in our opinion, absolutely required that the entire jury should have been kept within the same room, without regard to comfort or practical convenience, or that the sheriff should have lodged within the same

apartment with them." *Com. v. Shields*, 2 Bush 81.

(3) A verdict will not be set aside in the absence of any evidence of undue influence or interference by others merely because two of the jury may have deliberated or conversed apart from the others in another room after submission of case. *Blyew v. Com.*, 91 Ky. 200.

(4) Lodging of jury at a hotel on second floor, in different rooms along the hall, in which sheriff locked them at night, there being no pretense that they were tampered with, is a sufficient compliance with this section. *Minor v. Com.*, 5 R. 176.

(5) Objection to separation of jury, made for first time in a motion for a new trial, can not be considered; objection should have been made at the time. *Wilkerson v. Com.*, 88 Ky. 29.

§ 245. **Officer to be sworn.** A failure to administer to the officer having charge of the jury the oath as required by this section will be good ground for setting aside the verdict and granting a new trial. But, after being once sworn as required, it is necessary to administer the oath again at each adjournment or recess of the court. *Com. v. Shields*, 2 Bush 81.

§ 246. **Remark to jury by an outsider** that "defendant ought to be hung" was

court that it is their duty not to permit any one to speak to, or communicate with, them on any subject connected with the trial, and that all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, nor form, nor express, any opinion thereon, until the cause be finally submitted to them. This admonition must be given or referred to by the court at each adjournment.

§ 247 [244, 245] **Room for jury—board and lodging.** A suitable room must be provided for the use of the jury on their retirement for deliberation, with suitable furniture, fuel, lights and stationery; and suitable food and lodging must be provided, by the sheriff, for the jurors while they are kept together, and the expense thereof paid by the trustee of the jury fund and deducted from the compensation of the jurors.

§ 248 [246] **Jury to take papers and other things received as evidence.** Upon retiring for deliberation, the jury may take with them all papers and other things which have been received as evidence in the cause.

§ 249 [247] **Information as to law, or evidence after case submitted.** After the jury retires for deliberation, if there be a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties. (*See practice in civil cases, page 179.*)

§ 250. **Sickness of juror before jury completed.** If, after a juror has been accepted, but before the jury has been completed, one of the accepted jurors become so sick as to prevent the continuance of his duty, the court may excuse such juror, and complete the formation of the jury as if he had not been originally accepted.

§ 251 [248] **Discharge of jury—sickness of juror.** If, after retirement, one of the jurors become so sick as to prevent the continuance of his duty,

highly improper and grounds for a new trial, unless it appeared that the rights of accused were not prejudiced. *Hilton v. Com.*, 13 R. 158; and see *Campbell v. Bannister*, 79 Ky. 205.

§ 248. (1) **Taking papers to room.** It is proper for jury in retiring to deliberate to take the indictment, and where the accused failed at the time to object he can not afterward complain that former ver-

dict was allowed to remain written on indictment. *Cargill v. Com.*, 93 Ky. 578; and see *Herrold v. Com.*, 10 R. 71.

(2) The court may refuse to permit jury to take to their room depositions taken for the accused. *Baker v. Com.*, 13 R. 571.

§ 251. (1) **Discharge of jury.** It was held that sec. 248 of Code of 1854 (same as this section) did not restrict the power of

or other accident or cause occur, preventing them being kept together, or if, after being kept together such a length of time as the court deems proper, they do not agree in a verdict, and it satisfactorily appear that there is no probability they can agree, the court may discharge the jury; or if the sickness of a juror be temporary, the court may permit him to separate from the other jurors, and may place him in charge of an officer, or not, in its discretion.

§ 252 ⁽³⁴⁹⁾ **Jury discharged cause to be tried again.** In all cases if a jury be discharged, either in the progress of a trial or after the cause is submitted to them, the cause may be again tried at the same or another term of the court.

§ 253 ⁽³⁵⁰⁾ **Court always open while jury deliberating.** While the jury are absent, the court may adjourn from time to time as to other business, but it shall be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.

§ 254 ⁽³⁵¹⁾ **Final adjournment discharges jury.** A final adjournment of court discharges a jury.

ARTICLE 6.

VERDICT.

- § 255. Verdict—how rendered.
- § 256. General or special verdict.
- § 257. General verdict defined.
- § 258. Penalty, when jury to fix.
- § 259. Special verdict defined.
- § 260. Special verdict—requisites of.
- § 261. Special verdict—how rendered.
- § 262. Conviction for any degree included in or lower than charged.
- § 263. Degrees of offenses specified.

the court to discharge a jury in cases of necessity, to the causes enumerated in that section; but that that section was only intended as an adoption of the legal rule that a case of actual necessity must exist before a jury can be discharged; and that sec. 249 (same as sec. 252) was intended to apply to such cases as are mentioned in sec. 248 (251), and has direct reference to it. *O'Brian v. Com.*, 9 Bush 333.

(2) Discharge of jury because of failure to agree in the absence of accused does not bar another trial. *Yarbrough v. Com.*, 89 Ky. 151.

(3) See further, notes 7-11 to sec. 176, as to when discharge of jury operates as an acquittal; and see note 1, sec. 243.

§ 252. **Unconstitutional.** See note 1 to sec. 243.

- § 264. Offenses included in offense charged.
- § 265. Conviction can not be of higher degree than one charged.
- § 266. Verdict as to part of defendants.
- § 267. Polling of jury.
- § 268. Verdict and proceedings on plea of insanity.

§ 255 [353] **Verdict—how rendered.** When a jury have agreed upon their verdict they must be conducted into court by the officer having them in charge, their names called by the clerk, and, if they all appear, their foreman must declare their verdict. (*Verdict as to part of defts., sec. 266; polling jury, sec. 267.*)

§ 256 [353] **General or special verdict.** The jury may render either a general or a special verdict.

§ 257 [354] **General verdict defined.** A general verdict—

1. Upon a plea of guilty is “guilty,” and affixing the punishment in cases in which the jury is required to determine the degree of punishment. (*Punishment by labor, Ky. Stat., sec. 1377.*)

2. Upon a plea of “not guilty,” is “guilty,” or “not guilty;” and if “guilty,” fixing the offense, and the degree of the offense; and the punishment, in cases in which the jury is required to fix the degree of punishment.

3. Upon a plea of former acquittal or conviction, is “for the Commonwealth,” or “for the defendant,” and, if for the Common-

§ 255. (1) **Verdict rendered on Sunday** is valid. *Meece v. Com.*, 78 Ky. 586; *Bales v. Com.*, 11 R. 297.

(2) The prisoner must be present when verdict is rendered. *Temple v. Com.*, 14 Bush 769; and it may be read by the clerk in the presence of the jury. *Hasson v. Com.*, 10 R. 1054.

(3) After a verdict has been announced and while jury is being polled it is too late to correct an erroneous instruction and resubmit case to jury. *Roberts v. Com.*, 90 Ky. 654.

(4) Trial judge may in presence of jury alter their verdict in form, but not in substance, and when correction is made it should be read to jury and inquiry made if it is their verdict. *Blair v. Com.*, 93 Ky. 493; *Walker v. Com.*, 7 R. 46.

(5) In *Herrold v. Com.*, 10 R. 70, the jury in their verdict, after fixing punishment, recommended that accused should have credit by time he had served in penitentiary, and the court in its judgment reduced punishment in accordance

with recommendation. Held not prejudicial.

(6) When the indictment charges former convictions for felony, “it is the duty of the court to so instruct the jury as to enable them to find the fact of former convictions separate from their verdict as to the guilt or innocence of the accused of the pending charge, as the court could not give judgment for the increased penalty without such fact being found by the jury.” *Rector v. Com.*, 80 Ky. 468.

(7) The failure of member of jury who signs verdict to style himself foreman is immaterial. *Thomas v. Com.*, 12 R. 903.

(8) See further, notes to sec. 258.

§ 256. **Special verdict.** See note to sec. 259.

§ 257. **Verdict is sufficient** which reads “we, the jury, find the defendant guilty and fix his punishment at five years in the penitentiary,” the failure to name the offense is not prejudicial. *Hays v. Com.*, 12 R. 611; and verdict finding defendant

wealth, fixing the offense and degree of the offense, and the punishment, in cases in which the jury is required to determine the degree of punishment. (*Pleas defined, sec. 172.*)

§ 258 [254] **Penalty—when jury to fix.** In verdicts of “guilty,” or “for the Commonwealth,” the jury shall fix the degree of punishment to be inflicted, unless the same be fixed by law. (*See, to same effect, Ky. Stat., sec. 1136; as to punishment by labor, Ky. Stat., sec. 1377.*)

§ 259 [255] **Special verdict defined.** A special verdict is a finding of the facts only, leaving the law arising on the facts to the judgment of the court, with an ascertainment of the punishment in the event that the court pronounces a judgment of conviction on the verdict, in cases in which the jury is required to determine the punishment.

§ 260 [256] **Special verdict—requisites of.** A special verdict must present the conclusions of fact as established by the evidence, and not the evidence of those facts, and the facts must be so presented that the court has nothing to do but draw the conclusions of law upon them.

§ 261 [257] **Special verdict—how rendered.** The special verdict must be reduced to writing by the jury, and read to them in the presence of the court. It shall not be received by the court unless it pronounce affirmatively or negatively, on the facts necessary to enable the court to give judgment.

§ 262 [258] **Conviction for any degree included in or lower than charged.** Upon an indictment for an offense consisting of different degrees, the

“guilty as charged in the indictment” is sufficient when indictment only charges one offense. *Patterson v. Com.*, 86 Ky. 313; and see notes to sec. 255.

§ 258. (1) **Construction of section.** “This section means that if the law fixes the punishment, leaving no room for discretion on the part of the jury as to its kind or extent, then the law does not require them to fix the degree of punishment in their verdict. But where an alternative or indefinite punishment is denounced by law for a given offense, then the jury must be instructed, allowed and required to fix the kind and extent of the punishment within the limits prescribed by law.” *Herron v. Com.*, 79 Ky. 38.

(2) **Fixing less penalty than law authorized not prejudicial to accused.** *Johnson v. Com.*, 90 Ky. 57; *Logsdan v. Com.*, 9 R. 431.

(3) **Jury to fix penalty.** In all cases where life or liberty is involved or a fine is to be imposed which is not fixed

by statute the jury must fix the punishment. *Cornelison v. Com.*, 84 Ky. 583.

§ 259. (1) **Special verdict.** Special findings in which jury are instructed to find facts from a *preponderance* of the evidence are unwarranted. *Maiden v. Com.*, 82 Ky. 133.

(2) Where an indictment charges former convictions for felony the court should instruct the jury to find the fact of former convictions separate from their verdict as to the guilt or innocence of the accused. *Rector v. Com.*, 80 Ky. 468.

§ 262. (1) **Arson.** Attempt to commit is degree of. *Young v. Com.*, 12 Bush 243.

(2) **Assault and battery** is a degree of the offense of malicious wounding denounced by sec. 1151, Ky. Stat. *Com. v. Duncan*, 91 Ky. 592; and of the offense of an “assault with intent to rob.” *Barnard v. Com.*, 94 Ky. 285. See, for an elaborate discussion of the law of assault and battery, *Cornelison v. Com.*, 84 Ky. 583.

defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment. (*Degrees of offenses, sec. 263; offenses included, sec. 264; see further, secs. 14, 265; acquittal of any degree bar, sec. 177.*)

(3) Under an indictment for a simple assault, it is error to allow proof of a battery. Every battery includes an assault but every assault does not include a battery, and battery is an offense of a higher grade than a simple assault. *Furnish v. Com.*, 14 Bush 180; and see *Cornelison v. Com.*, 84 Ky. 583; and under an indictment for an assault with intent to rob accused may be found guilty of an assault and battery. *Barnard v. Com.*, 94 Ky. 285.

(4) **Breach of the peace.** A conviction for a breach of the peace is a bar to an indictment for malicious striking and wounding for the same offense. *Com. v. Bright*, 78 Ky. 238; *Cornelison v. Com.*, 84 Ky. 583; and to a prosecution for an assault and battery, for the same offense. *Com. v. Hawkins*, 11 Bush 603.

(5) **Conviction for lower degree.** On an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in the offense charged. *Com. v. Garland*, 3 Met. 478.

(6) **Degrees defined.** Degrees of offenses mentioned in the Code defined. *Conner v. Com.*, 13 Bush 714. See *Bush v. Com.*, 78 Ky. 268; *Buckner v. Com.*, 14 Bush 601.

(7) **Homicide—degrees of.** "One who has committed a homicide may be indicted and tried for murder, at the election of the prosecuting officer, or he may be indicted and tried for killing by willfully striking, under sec. 2, art. 4, chap. 20, Gen. Stat. [now sec. 1151, Ky. Stat.]. Whether he be indicted and tried for the one or the other, the judgment will bar a second prosecution. Where the indictment is for murder, the accused may be convicted of any degree of homicide as fixed by the common law, viz.: murder, voluntary man-

slaughter or involuntary manslaughter; but under such indictment can not be convicted of the crime mentioned in statute *supra*." *Ruckner v. Com.*, 14 Bush 601; see *Conner v. Com.*, 13 Bush 714.

(8) **Lottery.** Under an indictment for promoting a lottery, the defendant may be convicted of the offense of aiding in such promotion. *Miller v. Com.*, 13 Bush 731.

(9) **Malicious stabbing.** Under an indictment for malicious stabbing with intent to kill, the defendant may be found guilty, either of the felony charged, or of any lower degree of that offense. *Tyra v. Com.*, 2 Met. 1; as an assault and battery, 91 Ky. 592.

(10) **Rape.** Under an indictment for rape upon a female under twelve years of age, the defendant was convicted under sec. 6, art. 4, chap. 29, Gen. Stat. [now Ky. Stat., sec. 1155], of the offense of carnally knowing her, which was held to be a degree of the offense charged in indictment. *Fenston v. Com.*, 82 Ky. 549; *Young v. Com.*, 16 R. 496, and under an indictment for rape defendant may be found guilty of an assault with intent to commit that offense. *Bethel v. Com.*, 80 Ky. 526; and see *Evans v. Com.*, 79 Ky. 414; *Howell v. Com.*, 5 R. 174.

(11) **Robbery.** Under an indictment for robbery, a conviction for simple larceny may be had. *Com. v. Prewitt*, 82 Ky. 240; *Sullivan v. Com.*, 9 R. 430; as to assault with intent to rob see *Barnard v. Com.*, 94 Ky. 285.

(12) **Shooting.** The attempt to shoot another is but an inferior degree of the offense of shooting at another without inflicting a wound, and is included in it, and a conviction for the former offense may be sustained under an indictment for the latter. *Usher v. Com.*, 2 Duv. 394.

(13) The indictment charged a shooting with the intent to kill and murder.

§ 263 [359] **Degrees of offenses specified.** The offenses named in each of the subdivisions of this section shall be deemed degrees of the same offense, in the meaning of the last section :

1. All offenses of homicide.
2. All injuries to the person by maiming, wounding, beating and assaulting, whether malicious or from sudden passion, and whether attended or not with the intention to kill.
3. All offenses of larceny.
4. Arson and house burning.
5. Burglary and house breaking.
6. An offense, and the attempt to commit the offense, if the attempt be punishable.
7. Offenses which are or may be punished capitally are of the highest degree; other felonies are of higher degree than misdemeanors; and those punished by imprisonment of higher degree than those punished by fine alone. If the punishment be the same in kind, the amount that may be inflicted fixes the degree. (*Conviction of any degree bar, sec. 177.*)

§ 264 [360] **Offenses included in offense charged.** If an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive or intention, the offense without the circumstances, or with part only, is included in the offense, although that charge may be a felony, and the offense, without the circumstances, a misdemeanor only.

§ 265 [361] **Conviction can not be of higher degree than charged.** If the proof show the defendant to be guilty of a higher degree of the offense than is charged in the indictment, the jury shall find him guilty of the degree charged in the indictment. (*May be of lower degree, sec. 262.*)

§ 266 [362] **Verdict as to part of defendants.** Upon an indictment against several the jury may return a verdict of "guilty" as to some, and "not guilty" or a special verdict as to others; if the jury can not agree as to all the defendants they may find a verdict as to those concerning whom they do agree.

§ 267 [363] **Polling of jury.** Upon a verdict being rendered, the jury may be polled, at the instance of either party, which consists of the

The jury found the defendant guilty of shooting with the intent to kill or wound. Both of the offenses being penal, the charge of intent to kill and murder, being the higher, included that of an intent to kill or wound. *Robinson v. Com.*, 16 B. M. 609.

(32)

§ 263. (1) **Degrees of offenses.** See notes to sec. 262.

§ 264. **Offenses included** in offense charged. See *Barnard v. Com.*, 94 Ky. 285, and notes to sec. 262.

§ 267. **Polling jury.** The accused "has a right not only to see and know that the

clerk or judge asking each juror if it is his verdict, and if one answer in the negative the verdict can not be received.

§ 268 (264) **Verdict and proceedings on plea of insanity.** If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact in their verdict, and thereupon if the court, after hearing any testimony offered by the Commonwealth or the defendant, be satisfied that he is insane at the time the verdict is rendered, it may order him to be taken to a lunatic asylum. (*Trial of sanity of deft.*, secs. 156, 287.)

CHAPTER VII.

NEW TRIAL AND ARREST OF JUDGMENT.

- § 269. New trial defined.
- § 270. Effect of new trial.
- § 271. Grounds for new trial.
- § 272. Juror can be examined to show verdict was by lot.
- § 273. Time motion for new trial must be made.
- § 274. Grounds must be in writing and filed.
- § 275. Arrest of judgment—motion for defined.
- § 276. Arrest of judgment—grounds for.
- § 277. Time motion may be made.
- § 278. Court may arrest judgment without motion.
- § 279. Proceedings when judgment arrested.

§ 269 (265) **New trial defined.** A new trial is the re-examination of an issue of fact in the same court, by another jury, after a verdict has been given.

§ 270 (266) **Effect of new trial—former verdict not referred to.** The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict can not be used or referred to in evidence or in argument.

whole jury is present assenting to the verdict, but by polling to demand face to face of each juror whether the verdict is his verdict, and to object to it unless each member of the jury shall answer for himself that the verdict is his." Temple v. Com., 14 Bush 769.

§ 268. **Court of Appeals has no jurisdiction** to direct an inquiry as to whether or not the appellant (accused) has become insane since rendition of verdict and judg-

ment against him. Brown v. Com., 14 Bush 398.

§ 270. **New trial—effect of.** Where a new trial is granted to one who has been convicted of manslaughter under an indictment for murder, he is in the same position as if no trial had been had, and may be tried again for murder. Com. v. Arnold, 83 Ky. 1; and see notes 16-17 to sec. 176.

§ 271 [307] **Grounds for new trial.** The court in which a trial is had upon an issue of fact may grant a new trial, if a verdict be rendered against the defendant, by which his substantial rights have been prejudiced, upon his motion, in the following cases.

1. If the trial in a case of felony were commenced and completed in his absence.

2. If the jury have received any evidence out of court other than that resulting from a view as provided in this Code.

3. If the verdict have been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

4. If the court have misinstructed or refused properly to instruct the jury.

5. If the verdict be against law or evidence.

6. If the defendant have discovered important evidence in his favor since the verdict.

7. If from the misconduct of the jury, or from any other cause, the court be of opinion that the defendant has not received a fair and impartial trial.

§ 271. (1) **Defendant who fails to surrender himself** or supersede the judgment can not enter a motion for a new trial, or prosecute an appeal. *Norton v. Com.*, 78 Ky. 501; and see *Wilson v. Com.*, 10 Bush 526.

(2) **Defendant to be present during felony trial.** Sec. 183 and notes; but need not be present during trial for misdemeanor. Sec. 184 and notes.

(3) **Discharge of jury during trial.** Where the jury is guilty of misconduct, or a juror is improperly approached or addressed, or where the defendant is taken by surprise on account of absence of a witness the proper practice is to ask that jury be discharged. *Joseph v. Com.*, 8 R. 53; *Ellis v. Com.*, 9 R. 824; *Costigan v. Com.*, 11 R. 617.

(4) **Errors occurred during trial** must be called to attention of court at the time they occur or they will be waived, as where a person said to a juror "send him up for five years." *Ellis v. Com.*, 9 R. 824; or made other improper remark. *Crockett v. Com.*, 10 R. 159; or where the jury were permitted to separate during trial. *Brown v. Com.*, 14 Bush 398; and this rule applies to all errors occurring during trial that might

be available as grounds of reversal if presented to the court, or excepted to at time they occurred; 14 Bush 398; 13 Bush 246; *Wilkerson v. Com.*, 88 Ky. 29; *Rankin v. Com.*, 82 Ky. 424; *Merritt v. Com.*, 11 R. 16.

(5) **Errors waived if presented for first time in motion.** Alleged error in not keeping jury together, or in permitting Commonwealth's attorney to make improper argument; or objection to juror for want of statutory qualification, or because jury have found verdict by lot, can not be considered if made for first time in motion for a new trial. Sec. 281; *Kennedy v. Com.*, 14 Bush 340; *Brown v. Com.*, 14 Bush 398; *York v. Com.*, 82 Ky. 360; *Terrell v. Com.*, 13 Bush 246; *Redmon v. Com.*, 82 Ky. 333; but errors not specified in motion can be relied on an appeal. See note 21, sec. 340.

(6) **Jurors can not impeach their verdict.** "It is a well-settled principle, and one which is applicable to the action of all juries, that the testimony of the jurors is not competent to explain the grounds of their decision or impeach the validity of their finding." *Com. v. Skeggs*, 3 Bush 19; and see notes 20-24 to sec. 340, Civil Code.

§ 272 (303) **Juror can be examined to show verdict was by lot.** A juror can not be examined to establish a ground for a new trial, except it be to establish that the verdict was made by lot.

§ 273 (309) **Time motion for new trial must be made.** The application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment be postponed to another term, in which case it may be made at any time before judgment.

§ 274. **Grounds must be in writing and filed.** The grounds upon which a motion for a new trial is made must be stated in writing, and filed at the time of making the motion.

§ 275 (370) **Arrest of judgment—motion for defined.** A motion in arrest of judgment is an application, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty. (*See as to practice, sec. 279.*)

§ 276 (371) **Arrest of judgment—grounds for.** The only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. (*See further, sec. 278.*)

(7) **Motion for suspends judgment.** A motion for a new trial suspends the judgment until the motion is disposed of. An appeal can not be prosecuted while the motion is pending. *Lou. Chemical Works v. Com.*, 8 Bush 179.

(8) **Surprise.** A defendant is not entitled to a new trial on the sole ground of surprise occasioned by a witness, whom he has called, failing to give the evidence, or giving the evidence different from that he was expected to give. See this case for facts authorizing new trial because of improper conduct of the Commonwealth's attorney. *Ran-kin v. Com.*, 82 Ky. 424.

(9) **Verdict against evidence—not ground for reversal** if there is any evidence to support verdict. See notes to sec. 340.

§ 272. **Verdict by lot.** The action of trial court in overruling a motion for a new trial, asked because verdict was arrived at by lot, can not be reviewed by Court of Appeals. *Redmon v. Com.*, 82 Ky. 333; overruling *P. & E. R. R. Co. v. Com.*, 80 Ky. 147.

§ 274. **Grounds to be written.** On motion for new trial, the grounds relied on must be specified in writing. *Hopkins v. Com.*, 3 Bush 480; see note 21, sec. 340.

§ 276. (1) **Arrest of judgment.** The power of the court to arrest a judgment can only be exercised where there is no public offense charged; and, although the alleged offense may be so defectively stated as to make the indictment bad on demurrer, still, if any public offense has been committed by the accused within the jurisdiction of the court, conceding the facts alleged in the indictment to be true, the judgment will not be arrested. *Tully v. Com.*, 11 Bush 154.

(2) It is not necessary to state the ground of a motion in arrest of judgment, as there is only one ground. 11 Bush 154.

(3) Motion in arrest of judgment can only be sustained on the ground that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. *Ward v. Com.*, 14 Bush 233; *Walston v. Com.*, 16 B. M. 15; *Comely v. Com.*, 17 B. M. 403; *Com. v. Hadcraft*, 6 Bush 91; *Weatherford v. Com.*, 10 Bush 196.

(4) Judgment of the circuit court in arresting judgment and dismissing an indictment for assault with intent to rob, being reversed by the Court of Appeals on the appeal of the Common-

§ 277 ^[275] **Time motion may be made.** The motion may be made at any time before judgment, or after judgment during the same term of the court.

§ 278 ^[275] **Court may arrest judgment without motion.** The court may arrest the judgment without motion, on observing the defect in the indictment, named in section two hundred and seventy-six.

§ 279 ^[276] **Proceedings when judgment arrested.** If the court be of opinion, from the evidence on the trial, that the defendant is guilty of a public offense, he may be detained in custody, or on bail, in the manner and for the time prescribed in section one hundred and fifty-nine and section one hundred and sixty; but otherwise he shall be discharged on the arrest of judgment.

CHAPTER VIII.

BILLS OF EXCEPTION.

§ 280. Decisions subject to exception.

§ 281. Decisions not subject to exception.

§ 282. Exceptions noted of record—preparation of bill.

§ 280 ^[275] **Decisions subject to exception.** Upon the trial of criminal or penal prosecutions, either party may except to any decision of the

wealth, a new trial was awarded. Com. v. Tanner, 5 Bush 316.

(5) Though several persons be jointly indicted for distinct offenses charged to have been jointly committed, when not susceptible of a joint commission, if the indictment charged the one on trial in person with the commission of the offense, the judgment should not be arrested. Weatherford v. Com., 10 Bush 196.

(6) When the indictment is joint, if it appears in the proof that the party on trial was the only one concerned in the commission of the offense, there may be a verdict against him the same as though he was indicted alone. 10 Bush 196.

(7) Transfer of the case from one court to another having jurisdiction, although improperly made, is not ground for arresting a judgment. Tipper v. Com., 1 Met. 6.

(8) **Effect if motion sustained**—see sec.

279; and White v. Com., 9 Bush 178, holding that where a judgment of conviction is reversed because of error of court in overruling motion in arrest of judgment the defendant may be proceeded against upon a sufficient indictment.

§ 279. **Defendant may be detained after reversal.** Where a judgment in a criminal case is reversed upon the ground that the indictment is defective, and that the motion in arrest of judgment should have been sustained; upon the return of the case to the circuit court, if that court is of opinion from the evidence on the trial that the defendant is guilty of a public offense, he may be proceeded against as provided in this section. Cornelius v. Com., 3 Met. 481; 9 Bush 178.

§ 280. (1) **Continuance—refusal to grant** is subject to exception and a reversible error when improperly refused. Bates

court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.

§ 281^[276] **Decisions not subject to exception.** The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception.

§ 282^[277] **Exception noted of record—preparation of bill.** The exception shall be shown upon the record, by a bill of exceptions, prepared, settled and signed, as provided in the Code of Practice in civil cases. (*Provisions of Civil Code referred to, secs. 333 to 340; must contain all instructions, sec. 341. See form of bill and rules, pages 645, 646.*)

v. Com., 13 R. 132; and see note 15, sec. 189.

(2) **Exception to instructions** The attorney for the accused, when asked by the court to indicate his objection to the instructions, said he would reserve an exception to all the instructions. The court say: "The law makes no distinction between a general and a particular exception, as either is sufficient to authorize this court to examine an alleged error based on an exception taken as in this case." *Williams v. Com.*, 80 Ky. 313; and see further, as to instructions, sec. 341 and notes.

(3) **Evidence—error in rejecting or admitting.** Where it is objected that the court rejected evidence that should have been admitted, the bill of exceptions should show what the party expected the witness would testify to, or the exception can not be considered. *Tipper v. Com.*, 1 Met. 6; *Chrystal v. Com.*, 9 Bush 669; *Nichols v. Com.*, 11 Bush 575.

(4) In criminal as well as civil cases neither party can rely for reversal upon an erroneous decision made at the instance of the adverse party unless he objects to it at the time it is made and then excepts to the decision, but where the court acts on its own motion an exception is sufficient. *Branson v. Com.*, 92 Ky. 330.

(5) **Instructions—exceptions to.** Instructions should be identified in the record, *Weatherford v. Com.*, 10 Bush 196; and the record should show that it contains all the instructions. *Clem v. Com.*, 3 Met. 10; *Jane v. Com.*, 3 Met. 18; *Mitch-*

ell v. Com., 78 Ky. 204; and see sec. 341 and notes thereto.

(6) A general exception to all the instructions given is sufficient, without indicating what part of the instructions is objectionable. *Williams v. Com.*, 80 Ky. 313.

§ 281. (1) **Decisions not subject to exceptions.** Decisions of the court upon a motion for a new trial, or upon challenges to the panel, or for cause, are not subject to exception; nor can errors in the course of the trial, such as to the manner in which the jury is selected, or objection to a juror for want of a statutory qualification, or an error in not keeping the jury together, or in permitting Commonwealth's attorney to make improper arguments, or because jury arrived at their verdict by lot, or others of like character be considered if made for the first time in the motion for a new trial. *Kennedy v. Com.*, 14 Bush 340; *Brown v. Com.*, 14 Bush 398; *Farris v. Com.*, 14 Bush 362; *Morgan v. Com.*, 14 Bush 106; *Redmon v. Com.*, 82 Ky. 333.

§ 282. (1) **Bill of exceptions—preparation of.** See notes to sec. 333-339 Civil Code. In the absence of a bill of exceptions it will be presumed that action of trial court was correct and that evidence was sufficient to support verdict; the only question that can be considered is sufficiency of indictment to support verdict. *Cook v. Com.*, 13 R. 703.

(2) In the absence of a part of the evidence the court can not say that error was committed in receiving or rejecting testimony. *Brooks v. Com.*, 12 R. 403;

CHAPTER IX.

JUDGMENT.

- § 283. Time judgment may be rendered.
- § 284. Judgment must affix the penalty.
- § 285. Defendant must be present at judgment in felony case.
- § 286. Duty of court before rendering judgment.
- § 287. Causes defendant may show against judgment—insanity.
- § 288. Judgment rendered on two or more convictions.
- § 289. Judgment if punishment a fine.
- § 290. Judgment of death must fix the day of execution.
- § 291. Costs to be included in judgment.
- § 292. Judgment in cases of malfeasance or misfeasance.

§ 283 [276] **Time judgment may be rendered.** Upon verdicts in cases of misdemeanor, and verdicts of acquittal in cases of felony, and upon trials by the court, and upon a plea of guilty, the court may immediately render judgment; but upon verdicts of conviction in cases of felony, the court shall not pronounce judgment until two days after the verdict is rendered, unless the court be about to adjourn for the term. (*Forms of judgments and orders, page 673.*)

§ 284. **Judgment must affix the penalty.** The court shall, in its judgment, affix the degree of punishment to be inflicted as found by the verdict of the jury or fixed by law. (*See Ky. Stat., sec. 1378.*)

§ 285 [278] **Defendant must be present at judgment in felony.** Judgment shall not be rendered against a defendant in cases of felony, except in his presence. If he be in custody, he shall be brought into court by the proper officer, and if not in custody, a bench warrant shall be issued for his arrest, similar to the bench warrant on indictments. (*See sec. 183 and notes.*)

Com. v. Runnion, 3 Met. 2; Reed v. Com., 7 Bush 641.

§ 283. (1) **Sentence.** When verdict is rendered on the fifth day of the term, sentence may be pronounced on the seventh day. Bush v. Com., 80 Ky. 244; Sunday should not be counted in estimating the two days that should elapse between verdict and judgment, and where verdict is rendered on Saturday judgment should not be pronounced until following Tuesday, unless court is about to adjourn for the term, but in this case error in rendering judgment on Monday was not prejudicial, as motion for new trial and in arrest of judgment

had been overruled before judgment was pronounced. O'Brien v. Com., 89 Ky. 355.

(2) When court is about to adjourn for term judgment may be pronounced on same day that verdict is rendered. Lin v. Com., 12 R. 872.

§ 285. **Judgment must be entered.** The judgment should be entered in full on the order book and signed by the judge during the term at which it is rendered. The practice of making an entry on the minute book and signing the minutes is condemned; and in this case judgment was reversed because the judgment was not entered on the order book and signed

§ 286 [330] **Duty of court before rendering judgment.** When the defendant appears for judgment, he must be informed by the court of the nature of the indictment, his plea and the verdict thereon, if any; and he must be asked if he has any legal cause to show why judgment should not be pronounced against him.

§ 287 [331] **Causes defendant may show against—insanity.** He may show for cause against the judgment any sufficient ground for a new trial, or for arrest of judgment; he may also show that he is insane. If the court be of opinion that there is reasonable ground for believing he is insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impaneled as directed by the court. If the jury do not find him insane judgment shall be pronounced. If they find him insane, he must be kept in confinement, either in the county jail or lunatic asylum, until, in the opinion of the court, he become sane, when judgment shall be pronounced.

§ 288 [332] **Judgment on two or more convictions.** If the defendant be convicted of two or more offenses, the punishment of each of which is confinement, the judgment shall be so rendered that the punishment in one case shall commence after the termination of it in the others.

§ 289 [333] **Judgment if punishment a fine.** If the punishment of an offense be a fine, the judgment may direct that the defendant be imprisoned until the fine be paid, specifying, however, the extent of imprisonment, which shall not exceed one day for each two dollars of the fine. (*Judgment may direct punishment at hard labor, Ky. Stat. sec. 1377.*)

§ 290 [334] **Judgment of death must fix day of execution.** If judgment of death be pronounced, the day of the execution thereof shall be fixed in the judgment, and shall not be in less than thirty days after the judgment. (*See further, Ky. Stat., sec. 1137.*)

§ 291 [335] **Costs to be included in judgment.** In judgments against the defendant for a misdemeanor, a judgment for costs, in addition to the other punishment, shall be rendered, which shall be taxed by the clerk, and shall be for the benefit of the officers rendering the services. (*Judgment for costs in all cases, now see Ky. Stat., sec. 886.*)

during the term. *Johnson v. Com.*, 80 Ky. 377.

§ 287. **Court of Appeals** has no power to direct an inquiry into question of insanity of accused after rendition of judgment in lower court. *Brown v. Com.*, 14 Bush 398.

§ 288. **Judgment on two convictions.** Where a defendant at the same term was

convicted under two indictments the judgment in second case properly provided that the punishment should not begin until the punishment under first indictment expired. *Evans v. Com.*, 11 R. 573, changing rule adopted by lower court in *James v. Ward*, 2 Met. 271. See as to proper judgment in cases of second and third convictions for felony under sec.

§ 292 [200] **Judgment in cases of malfeasance or misfeasance.** When a judge of the county court, justice of the peace, sheriff, coroner, surveyor, jailer, county assessor, attorney for the county, constable, city or police judge or marshal shall be convicted upon an indictment for malfeasance or misfeasance in office, or for willful neglect in the discharge of their official duties, or for any offense which by the statute law or Constitution creates a forfeiture of his office, the court shall render a judgment of removal from office, in addition to the other penalties and punishment prescribed by law. (*See further, Constitution, sec. 227; Ky. Stat., sec. 3748.*)

CHAPTER X.

EXECUTION.

- § 293. Copy of judgment authorizes sheriff to execute.
- § 294. Death penalty—how executed.
- § 295. Suspension of death sentence.
- § 296. Insanity or pregnancy of defendant—proceedings.
- § 297. Death penalty when Governor to fix date for execution.
- § 298. Imprisonment—execution of judgment for.
- § 299. Powers of sheriff conveying prisoner to penitentiary.
- § 300. Sheriff to make written return of execution.
- § 301. Execution to issue on judgment for fine.
- § 302. Execution on judgment against bail.
- § 303. Execution of judgment for abatement of nuisance.
- § 304. Period of confinement for fine.
- § 305. Replevy of fine after confinement—effect of.

§ 293 [201] **Copy of judgment authorizes sheriff to execute.** If a judgment of death or confinement, either in the penitentiary or the county jail, be pronounced, a certified copy thereof must be furnished forthwith to the sheriff, who shall thereupon execute it, and no other warrant or authority is necessary to its execution. (*Proceeding upon affirmance of death penalty, sec. 346.*)

§ 294 [202] **Death penalty—how executed.** The judgment of death must be executed by the sheriff on the day designated in the judgment between sunrise and sunset, by hanging the defendant by the neck until he is dead. (*See further, as to execution, Ky. Stat., sec. 1137.*)

1130 Ky. Stat. Chenowith v. Com., 11 sec. 227 of Constitution in Ky. Stat.
R. 561; Combs v. Com., 14 R. 245. and notes thereto; and sec. 3748 Ky.

§ 292. Malfeasance or misfeasance. See Stat.

§ 295 (300) **Suspension of death sentence.** The only officers who shall have the power of suspending the execution of a judgment of death are the governor and, in cases of insanity or pregnancy of the defendant, the sheriff, as provided in the next section; and, in cases of appeals, the clerk of the Court of Appeals, as prescribed in title nine, chapter one, article one.

§ 296 (300) **Insanity or pregnancy of defendant—proceedings.** If the sheriff be satisfied that there are reasonable grounds for believing that the defendant is insane or pregnant, he may summon a jury of twelve persons on the jury list, drawn by the clerk, who shall be sworn by the sheriff well and truly to inquire into the insanity or pregnancy of the defendant, and a true inquisition return; they shall examine the defendant and hear any evidence that may be presented; and by a written inquisition, signed by each of them, find as to the insanity or pregnancy. Unless the inquisition find the defendant insane or pregnant, the sheriff shall not suspend the execution; but if the inquisition find the defendant insane or pregnant, he shall suspend the execution and immediately transmit the inquisition to the governor.

§ 297 (301) **Death penalty—when governor to fix day for execution.** Whenever a judgment of death has not been executed on the day appointed therefor by the court, from any cause whatever, the governor, by a warrant under his hand and the seal of the State, shall fix the day of the execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution.

§ 298 (302) **Imprisonment—execution of judgment.** The sheriff, in executing a judgment of confinement, shall deliver the defendant, with a certified copy of the judgment, to the keeper of the penitentiary, or to the jailer, according to the judgment.

§ 299 (303) **Powers of sheriff conveying prisoner to penitentiary.** In carrying the defendant to the penitentiary, the sheriff shall have all the powers of preventing an escape, of resisting an effort to rescue the defendant, of recapturing him, and of summoning persons to his aid, that he would have in executing a warrant of arrest in his county.

§ 300 (304) **Sheriff to make written return of execution.** The sheriff shall make a written return of the execution of the judgment of death or imprisonment, and file the same with the clerk of the court in ten days after such execution.

§ 301 (305) **Execution to issue on judgment for fines.** Upon judgments for

§ 301. **Capias.** A *capias pro fine* may issue upon a judgment without an order of court. A party arrested under a *capias* in a county other than that from

which it was issued should be taken by the officer to the jail of the county from which it issued. *Long v. Wood*, 78 Ky. 392.

finer, whether rendered on indictments, penal actions or otherwise, writs of execution, as provided in the General Statutes [now Kentucky Statutes] may be issued against the person or property of the defendant. (*Form of executions, page 677 ; form of capias, page 677 .*)

§ 302 [200] **Execution on judgment against bail.** Upon judgments against bail, only such execution shall be issued as may be issued upon judgments in civil actions for debt. (*Form of execution, page 638 .*)

§ 303 [201] **Execution of judgment for abatement of nuisance.** A certified copy of a judgment for the abatement or removal of a nuisance, or for any other thing than the payment of money by the defendant, when delivered to the sheriff, shall authorize and require him to execute it; and he shall make a return of his executing it, and file the same with the clerk of the court, in sixty days after a copy is delivered to him.

§ 304 [202] **Period of confinement for fine—effect of.** The defendant shall not be held in confinement under an execution for a fine for a longer period than at the rate of one day for each two dollars of the fine; but such confinement shall not discharge the fine, which thereafter can only be collected by proceedings against the defendant's property. The provisions of this section shall not apply to judgments in city or police courts, which may be discharged by confinement in the city work-house, according to the provisions of the special statutes regulating them. (*Punishment by hard labor, see Ky. Stat., sec. 1377 ; imprisonment for costs, Ky. Stat., sec. 886 ; for acts relating to police courts, page 551 .*)

§ 305. **Replevy of fine after confinement—effect of.** In all cases in which a person is confined in a jail or work-house for the non-payment of a fine, it shall be lawful for the clerk of the court in which the judgment was rendered to take bond from such person with good surety for the payment of the fine and costs. The bond shall be for the same time and substantially of the same form, and shall have the same force and effect as a replevin bond. The defendant upon the execution of such bond, and procuring a certificate of its execution, shall be discharged by the jailer or keeper of the work-house, if detained for no other cause. The clerk shall have fifty cents for taking the bond which shall be included in the amount thereof. (*Form of bond, page 641 ; hard labor sentence may be replevied, Ky. Stat., sec. 1380 .*)

TITLE VII.

PROCEEDINGS IN POLICE OR CITY COURTS.

[See sec. 2911, Kentucky Statutes, for provisions relating to police courts in cities of the first class; sec. 3146 for second class; sec. 3352 for third class; sec. 3510 for fourth class; sec. 3651 for fifth class; sec. 3710 for sixth class; and note how provisions of this title are changed; also see jurisdiction of these courts, page 551 of this Code.]

- § 306. Indictment, when not necessary.
- § 307. Grand jury, provision as to.
- § 308. Term of court may be fixed by judge.
- § 309. Proceedings when defendant brought before the court.
- § 310. Summons to be issued against offender.
- § 311. Summons—requisites of, to whom directed.
- § 312. Warrant of arrest may be issued by judge.
- § 313. Time prosecutions stand for trial.
- § 314. Summons, how executed.
- § 315. Witnesses' attendance—how secured.
- § 316. Postponement of trial.
- § 317. Provisions of title six apply.
- § 318. Written pleadings not necessary if no indictment.
- § 319. Trial of issues of law and fact.
- § 320. Clerk of court—laws relating to.
- § 321. Police courts defined.
- § 322. Louisville City Court.

§ 306 (291) **Indictment, when not necessary.** No indictment shall be necessary in prosecutions for violation of the by-laws or ordinances of a city or town, nor in other prosecutions in police or city courts, unless the punishment of the offense exceed a fine of one hundred dollars or confinement for thirty days. (*Jurisdiction of, secs. 13, 19, and page 551. See further, sec. 10.*)

§ 307 (300) **Grand jury—provision as to.** If the police or city court have jurisdiction of offenses which can only be prosecuted by indictment, the court may order the peace officer, whose duty it is to attend the court, to summon a competent number of grand jurors, the qualifications of whom shall be as prescribed in the General Statutes, [now Kentucky Statutes], and who shall be sworn, and have the powers and duties prescribed in chapter one of title six.

§ 308 (301) **Terms of court may be fixed by judge.** The judge of the police or city court may, by orders entered on its minutes, fix terms for its sessions, to which process shall be returnable, but may hold the court at any time for the transaction of business brought before him.

§ 309 [303] **Proceedings when defendant brought before court.** When a person has been arrested and brought before the city court or the judge thereof, charged with an offense within the jurisdiction of such court, and not requiring an indictment, he shall be forthwith tried, or at the discretion of the judge, held to bail for his future appearance for trial, or discharged from custody. (*Form of bail bond, page 657.*)

§ 310 [304] **Summons to be issued against offender.** Upon information given by a peace officer, or by a private person, on oath, to the clerk of the court, that an offense within the jurisdiction of such court, and not requiring an indictment for its prosecution, has been committed, the clerk shall issue a summons against the offender.

§ 311 [305] **Summons — requisites of, to whom directed.** The summons mentioned in the last section shall command the peace officer to whom it is directed to summon the defendant, naming him, to appear in the court, on a day to be named in the summons, to answer the charge made against him, of having committed an offense, naming or briefly describing it, and to return the summons on a day to be named. It shall be signed by the clerk, and directed to the marshal of the town or city, but may be executed by any peace officer of the city or county. (*Form of summons, page 652.*)

§ 312 [306] **Warrant of arrest may be issued by judge.** Upon information on oath made to the judge of the court, he may order a warrant of arrest to be issued, which shall be similar to the summons, except in the command to arrest the defendant, instead of summon him. (*Form of warrant, page 653.*)

§ 313 [307] **Time prosecutions stand for trial.** All prosecutions in such courts shall stand for trial immediately, if the defendant be in custody, or on bail for the offense charged, or on the day to which the defendant is summoned to appear, provided the summons be executed within the limits of the court's jurisdiction one day, or elsewhere ten days, before the day on which he is warned to appear. If not executed as above provided, the trial shall be postponed to a day to be fixed by the court.

§ 314 [308] **Summons, how executed.** The summons shall be executed by

§ 312. (1) **Warrant—form of.** It is not necessary that a warrant charging the selling of liquor in violation of an ordinance should specify the quantity sold or the place where it was drunk; nor is an erroneous statement as to the date material; proof may be heard as to any sale within the time allowed for the prosecution of the offense prior to the date of the warrant. *Megowan v. Com.*, 2 Met. 3.

(2) The same strictness is not required in justice's court as is in circuit court. *Wade v. Com.*, 3 R. 442.

§ 314. **Service of summons** on corporation is sufficient if it is read to the officer or agent of the corporation upon whom a summons should be served. *L. & N. R. R. v. Board of Trustees*, 8 R. 59; see, for form of summons, sec. 146 and page 652.

the officer by reading it to the defendant, or stating to him its contents; and, if required, the officer shall show it to him.

§ 315 [300] **Witnesses' attendance, how secured.** The clerk shall issue subpoenas for witnesses at the request of the officers of the city, or of the defendant, and the court may compel their attendance in the manner and by the process prescribed in the Civil Code. (*Form of subpoena and attachment, page 655 ; provisions of Civil Code referred to, sec. 537.*)

§ 316 [300] **Postponement of trial.** The court may, for good cause, grant continuances or postponements of the trial.

§ 317 [310] **Provisions of title six apply.** The provisions of this Code in title six, so far as applicable, shall govern the proceedings of police or city courts, except as provided in this title.

§ 318 [311] **Written pleadings not required if no indictment.** No written information or pleadings are required in prosecutions in which an indictment is unnecessary.

§ 319 [312] **Trial of issues of law and fact.** The issues of law and fact shall be tried by the judge, in all cases in which the only punishment is a fine of sixteen dollars or less; in other cases the defendant may demand that issues of fact be tried by a jury.

§ 320 [313] **Clerk of court—laws relating to.** If the judge act as the clerk of the court, the provisions of this title as to the clerk shall apply to him.

§ 321 [314] **Police courts defined.** Mayors' courts, and courts held by chairman of trustees of towns, are police courts in the meaning of this Code. (*Local jurisdiction of, sec. 19.*)

§ 322 [315] **Louisville City Court.** The laws regulating the proceedings in the Louisville City Court, and prescribing the powers and duties of the officers of said court, shall not be changed by the provisions of this title, but remain in full force; and the provisions of this title shall only apply to said court so far as they are consistent with the existing laws regulating said court. (*For laws relating to Louisville City Court, see Ky. Stat., sec. 2911.*)

TITLE VIII.

PROCEEDINGS IN JUSTICES' COURTS.

[See Kentucky Statutes sec. 1093, and page 550 of this Code for jurisdiction of justices' courts.]

- § 323. Proceedings when accused brought before justice.
- § 324. Disposition of defendant if trial postponed.
- § 325. Bail or bond for good behavior may be required.
- § 326. Summons or warrant—when justice may issue.
- § 327. Warrant of arrest—when may issue.
- § 328. Summons and warrant, form of.
- § 329. Witnesses' attendance, how secured.
- § 330. Pleadings may be oral.
- § 331. Trial of issues of law and fact.
- § 332. Jury trial—summoning jury.
- § 333. Provisions of title six apply.

§ 323 [316] **Proceedings when accused brought before justice.** If a person be brought, or, in obedience to a bail bond, come before a justice of the peace charged with the commission of an offense within the jurisdiction of his court, as prescribed in title two, the justice shall forthwith proceed to the trial of the charge, or for sufficient cause may postpone the trial to a future day. (*Jurisdiction of justice, secs. 13, 18; how justice to proceed in felony case, sec. 71.*)

§ 324 [317] **Disposition of defendant if trial postponed.** If the trial be postponed, the defendant may be committed to the custody of a peace officer, or to jail, or discharged upon bail or without bail.

§ 325 [318] **Bail or bond for good behavior may be required.** It shall be the duty of the justice to require bail of the defendant upon its being made to appear that, unless bail be required, he will probably escape punishment, or that his discharge without bail would endanger persons or property; in which latter case the justice may also require security for the peace or for good behavior. (*Form of bail bond, page 657; bond for good behavior, page 661; other provisions concerning security for good behavior, secs. 382 to 394.*)

§ 326 [319] **Summons or warrant—when justice may issue.** If from his personal knowledge, or from information given to him on oath, a justice be satisfied that there are reasonable grounds for believing that a person has committed a public offense within the jurisdiction of his court, he shall either issue a warrant of arrest or a summons against such person.

§ 327 ^[327] **Warrant of arrest, when may issue.** The warrant of arrest shall not be issued unless the offense charged be one of actual or apprehended violence to person or property, accompanied with a breach of the peace; or the justice be satisfied that there are reasonable grounds for believing that the defendant will escape punishment unless arrested.

§ 328 ^[328] **Summons and warrant, form of.** The warrant of arrest and the summons shall be similar to those prescribed in title seven. (*Form of warrant, page 653; summons, page 652.*)

§ 329 ^[329] **Witnesses' attendance, how secured.** The justice shall issue subpoenas for witnesses and for the production of documentary evidence, and enforce their attendance, or its production, as prescribed in the Civil Code. (*Form of subpoena, page 655; attachment, page 655; provisions of Civil Code referred to, sec. 537.*)

§ 330 ^[330] **Pleadings may be oral.** No written information, nor pleadings, shall be required in prosecutions in justices' courts.

§ 331 ^[331] **Trial of issues of law and fact.** The issues of law and fact shall be tried by the justice, in all cases in which the only punishment is a fine of sixteen dollars or less. In other cases the defendant may demand that issues of fact be tried by a jury.

§ 332 ^[332] **Jury trial—summoning jury.** Upon a jury trial being lawfully demanded, the justice shall order a peace officer to summon a sufficient number of qualified jurors, from which the jury may be formed.

§ 333 ^[333] **Provisions of title six apply.** The provisions of title six, so far as applicable, shall govern the trial, verdict, judgment and execution in prosecutions in justices' courts, except as provided in this title. (*Form of capias pro fine, page 677.*)

TITLE IX.

APPEALS.

CHAPTER I. TO THE COURT OF APPEALS, 884.

II. TO CIRCUIT COURTS, 362.

CHAPTER I.

TO THE COURT OF APPEALS.

ARTICLE 1. IN FELONIES, 334.

2. IN MISDEMEANORS, 347.

3. GENERAL PROVISIONS, 357.

ARTICLE 1.

IN FELONIES.

§ 334. Appeal in felony cases.

§ 335. Appeal by defendant or Commonwealth.

§ 336. Time and manner of appealing—suspension of judgment.

§ 337. Time and manner of appealing by Commonwealth.

§ 338. Summons or notice not necessary.

§ 339. Judgment of acquittal, when not to be reversed.

§ 340. Errors that authorize reversal of judgment of conviction.

§ 341. Instructions to appear in bill of exceptions.

§ 342. Death of accused terminates appeal.

§ 343. Effect of appeal by defendant in penitentiary.

§ 344. Removal of defendant from penitentiary after reversal.

§ 345. Credit for confinement on second conviction.

§ 346. Affirmance of death penalty—proceedings.

§ 334 (337) **Appeal in felony cases.** The Court of Appeals shall have appellate jurisdiction in prosecutions for felonies, subject to the restrictions contained in this article.

§ 334. (1) **Appeal—escaped prisoner can not prosecute.** An escaped prisoner convicted of a felony will not be permitted to prosecute an appeal to reverse the judgment of conviction. *Wilson v. Com.*, 10 Bush 526; and see *Norton v. Com.*, 78 Ky. 501.

(2) **Jurisdiction of Court of Appeals in misdemeanors.** See sec. 347.

(3) **Right of appeal is not a constitutional right and the accused desiring to appeal**
(33)

must conform to the rules prescribed by law. *Turner v. Com.*, 89 Ky. 78; the revisory jurisdiction of Court of Appeals is conferred by statute. *Rutherford v. Com.*, 78 Ky. 639.

(4) Where an appeal was dismissed for want of prosecution it will not on motion of the prisoner be reinstated on docket after lapse of several years. 89 Ky. 78.

§ 335 ^(322, 340) **Appeal by defendant or Commonwealth.** An appeal shall only be taken on a final judgment, except on behalf of the Commonwealth. An appeal by the Commonwealth from a decision of the circuit court shall not suspend the proceedings in the case. The decision of the Court of Appeals shall be obligatory on the circuit courts, as being the correct exposition of the law.

§ 336 ⁽³²²⁾ **Time and manner of appealing—suspension of judgment.** An appeal may be taken by the defendant in the following manner only:

1. The appeal must be prayed during the term at which the judgment is rendered, and the prayer noted on the record in the circuit court. The appeal shall be granted as a matter of right.

2. When an appeal is prayed the court shall, if the defendant desire it, make an order that the execution of the judgment be suspended until the expiration of the period within which the defendant is required to lodge a transcript of the record in the clerk's office of the Court of Appeals. After the expiration of such period the judgment shall be executed unless the defendant shall have filed in the clerk's office of the court rendering the judgment, the certificate, as provided in subsection three of this section, that the appeal has been taken, or a copy of an order of the Court of Appeals granting further time to lodge the transcript.

3. The appeal is taken, by lodging in the clerk's office of the Court of Appeals, within sixty days after the judgment, a certified transcript of the record. The clerk of the Court of Appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment until the decision upon the appeal.

§ 335. (1) **Defendant** can only appeal from final judgment. *Smith v. Com.*, 5 R. 851.

(2) **Mistrial — appeal by Commonwealth** may be taken for the purpose of reviewing the decisions of the trial court in admitting and rejecting evidence and in giving and refusing instructions. *Com. v. Matthews*, 89 Ky. 287; and see sec. 337 and notes.

(3) **New trial granted by lower court.** Commonwealth may appeal to have law of case settled before another trial, but can not interfere with action of court in granting a new trial. *Com. v. Hourigan*, 89 Ky. 305.

§ 336. (1) **Appeal by defendant — when record to be filed.** When the transcript in

a felony case is not filed within sixty days after judgment, and no order made within that period extending the time for filing, the Court of Appeals is without jurisdiction to try the appeal. Nor has the Court of Appeals power, after the expiration of the time provided by law for filing the transcript, to make an order extending the time. *Medcalf v. Com.*, 84 Ky. 485; overruling *Mackey v. Com.*, 80 Ky. 345.

(2) To give Court of Appeals jurisdiction in felony case, a certified transcript of the record must be filed in the clerk's office within sixty days after judgment; unless the court extend the time the fact that record was mislaid by clerk and not found until after sixty days can not con-

4. If time be given, beyond the term at which the judgment is rendered, to present a bill of exceptions, the transcript of the record may be filed in the clerk's office of the Court of Appeals, within sixty days after the bill of exceptions is made a part of the record.

§ 337 ^[331] **Time and manner of appealing by Commonwealth.** If an appeal on behalf of the Commonwealth be desired, the Commonwealth's attorney shall pray the appeal during the term at which the decision is rendered, whereupon the clerk shall immediately make a transcript of the record and transmit the same to the attorney general, or deliver the transcript to the Commonwealth's attorney, to be transmitted by him. If the attorney general, on inspecting the record, be satisfied that error has been committed to the prejudice of the Commonwealth, upon which it is important to the correct and uniform administration of the criminal law that the Court of Appeals should decide, he may, by lodging the transcript in the clerk's office of the Court of Appeals, within sixty days after the decision, take the appeal.

§ 338 ^[332] **Summons or notice not necessary.** No summons nor notice shall be necessary upon an appeal.

§ 339 ^[333] **Judgment of acquittal—when can not be reversed.** A judgment in favor of the defendant which operates as a bar to a future prosecution for the offense shall not be reversed by the Court of Appeals. (*When judgment sustaining demurrer a bar, sec. 169.*)

§ 340 ^[334] **Errors that authorize reversal of judgment of conviction.** A judg-

fer jurisdiction. *Stratton v. Com.*, 84 Ky. 190.

(3) When time beyond the term to prepare and present bill of exceptions is given, if the transcript is filed within sixty days after the bill of exceptions is made part of the record it will be in time. *Strassel v. Com.*, 80 Ky. 525.

(4) **Mandate in criminal case**, in case of affirmance, may issue immediately. *Nelson v. Com.*, 94 Ky. 594.

§ 337. (1) **Appeal by Commonwealth.** On the appeal of the Commonwealth in felony cases any ruling of the lower court may be reviewed, whether it be final or not, and without reference to whether the judgment is upon a verdict, or whether it be a bar to another prosecution for the same offense. When the lower court assigns a reason for sustaining a demurrer to an indictment, the Court of Appeals is not limited to the consideration of the reason so assigned,

but must determine for itself whether the indictment is good or bad. It is the indictment and not the opinion of the lower court that must determine whether the judgment on demurrer shall operate as a bar. *Com. v. Cain*, 14 Bush 525; and see *Com. v. Bruce*, 79 Ky. 560.

(2) **Cross-appeal** can not be taken by the Commonwealth, but on the appeal of the accused the court will pass on questions excepted to by the Commonwealth. *Terrell v. Com.*, 13 Bush 246.

(3) **Mistrial**—Commonwealth may appeal. *Com. v. Matthews*, 89 Ky. 287; and may also appeal if a new trial has been granted by lower court. *Com. v. Hourigan*, 89 Ky. 305.

§ 339. **Judgment of acquittal** for an offense the punishment of which is imprisonment shall not be reversed. Sec. 352.

§ 340. (1) **Accused to be present during felony trial.** For decisions relative to the right of the accused to be present during

ment of conviction shall be reversed for any error of law [appearing on the record when, upon consideration of the whole case, the

the whole of his trial for a felony, see *Meece v. Com.*, 78 Ky. 586; *Rutherford v. Com.*, 78 Ky. 639; *Temple v. Com.*, 14 Bush 769; and sec. 183, and notes thereto.

(2) Accused need not be present in misdemeanor trial. Sec. 184 and notes.

(3) **Agreements—defendant bound by.** The defendant and Commonwealth's attorney agreed that a special judge to try his case could not be procured by election, and in consequence thereof the governor appointed one. He was held bound by his agreement. The court say: "There is a broad distinction between an admission of a fact necessary to put the machinery of the law in motion, to the end that a trial may be had, and the consent of one charged with a felony to be tried by less than twelve jurors, or that one not legally qualified shall preside as judge at the trial." *Kennedy v. Com.*, 78 Ky. 447; and see further, note on page 451.

(4) **Bill of exceptions—preparation of.** Sec. 282 and notes; form of, page 545.

(5) **Challenge to juror.** Although the disallowance of a challenge *for cause* by the defendant may have influenced his course in the use of the peremptory challenges allowed him, it can not be regarded as a refusal to allow a peremptory challenge within the meaning of sec. 334 (sec. 281) of the Criminal Code, and regarded as a challenge *for cause merely* it can constitute no cause for reversal. *Moore v. Com.*, 7 Bush 191.

(6) **Code of 1854.** Under Code of 1854, sec. 334, a reversal was only authorized for the following errors, apparent in the record, viz.: An error of the circuit court in admitting or rejecting important evidence; or in instructing or refusing to instruct the jury; or in failing to arrest the judgment; or in allowing or disallowing a peremptory challenge. Observe change made by this section.

(7) **Continuance.** Refusal to grant when defendant entitled to continuance is ground for reversal. Sec. 189 and notes; *Bates v. Com.*, 13 R. 132; *Morgan v.*

Com., 14 Bush 106; *Salisbury v. Com.*, 79 Ky. 425.

(8) **Decisions not subject to exception.** A judgment can not be reversed for a decision of the court upon challenges to the panel, or for cause, or upon motion to set aside an indictment, or upon motion for a new trial. Sec. 281; *Kennedy v. Com.*, 14 Bush 340; *Farris v. Com.*, 14 Bush 362; 14 Bush 106; 82 Ky. 333; 13 Bush 246.

(9) Where the question that the jurors arrived at their verdict by lots is made for the first time in the motion for a new trial the error can not be considered, as the court has no power (sec. 231) to revise the ruling of the lower court in overruling the motion for a new trial. *Redmon v. Com.*, 82 Ky. 333; overruling *P. & E. R. R. Co. v. Com.*, 80 Ky. 147.

(10) Objection to juror because he was an alien, or had expressed the opinion that the accused was guilty, or error in not keeping jury together, or in permitting Commonwealth's attorney to make improper argument. *Kennedy v. Com.*, 14 Bush 340; or because jury was not properly drawn, made for first time in motion for new trial can not be considered. *York v. Com.*, 82 Ky. 360.

(11) Objections made privately to the judge to statements made by Commonwealth's attorney in argument do not preserve any question for the Court of Appeals. *Farris v. Com.*, 14 Bush 362. See *Rankin v. Com.*, 82 Ky. 424, as to improper conduct of Commonwealth's attorney.

(12) **Errors that authorize reversal.** In reference to the amendment to this section the court say: "If this amendment is ordinarily to have any effect it must be construed to mean that the power of this court to reverse in felony cases depends upon two things: First, that an error appears on the record; second, the court must be satisfied, from consideration of the whole case, that the substantial rights of the accused have been prejudiced by the error complained of. But while the statute receives this

court is satisfied that the substantial rights of the defendant have been prejudiced thereby]. (*Words in brackets added by act 1880.*)

construction it must be allowed a certain flexibility which will exclude from its operation cases not reasonably presumed to have been contemplated by the law-makers. The letter must not be so construed as to kill the spirit." *Rutherford v. Com.*, 78 Ky. 639.

(13) "We must reverse for any error of law appearing *in the record* to the prejudice of the appellant, but this only applies to such errors as the party had a right to manifest by bill of exceptions. An error in respect to any of the matters which, under section 281, can not be excepted to, is not an error appearing 'in the record' within the meaning of section 340." *Kennedy v. Com.*, 14 Bush 340.

(14) **Errors occurring during trial must be excepted to at time they occur**, or they will be waived. *Wilkerson v. Com.*, 88 Ky. 29; *Rankin v. Com.*, 82 Ky. 425; *Merritt v. Com.*, 11 R. 16; 14 Bush 398; 13 Bush 246; and see notes to sec. 271.

(15) **Errors—how shown.** See sec. 282 and notes.

(16) **Evidence—error in rejecting or admitting.** Alleged error in refusing to permit a witness to answer a question can not be considered, unless it appear in the record what answer it was expected the witness would make. *Tipper v. Com.*, 1 Met. 6; *Chrystal v. Com.*, 9 Bush 609; *Nichols v. Com.*, 11 Bush 575; *Fenston v. Com.*, 82 Ky. 549. And it is not proper to permit counsel to state in the presence of the jury what rejected evidence would be. *Flint v. Com.*, 81 Ky. 186.

(17) Objection must be made at time of introduction of incompetent evidence, and if admitted an exception taken, or error will not be available; an exception to the ruling of the court admitting it is not sufficient. *Branson v. Com.*, 92 Ky. 330; and see further, *Clem v. Com.*, 3 Met. 10; *Burns v. Com.*, 3 Met. 14; *Adwell v. Com.*, 17 B. M. 310.

(18) To authorize the reversal of a judgment of conviction for felony upon the ground of the rejection of evidence offered on the part of the defendant, it is

not sufficient that the rejected evidence be shown to have been merely pertinent, or relevant, or technically admissible; it must be *important* for the defendant, in view of the whole case as presented. *Champ. v. Com.*, 2 Met. 17.

(19) In regard to the admission of incompetent evidence, the court say: "What effect it had on the minds of the jury no one can know; we can not speculate on its effect; it is enough for this court to know that it was wrong, and may have operated to the prejudice of the appellant." *Kennedy v. Com.*, 14 Bush 340; and see *Coppage v. Com.*, 3 Bush 532.

(20) **Evidence not sufficient.** "This court has no power to reverse a judgment of conviction in a criminal case upon the sole ground there was not sufficient evidence to sustain the verdict, being restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the accused." *Vowels v. Com.*, 83 Ky. 193. See *Tipper v. Com.*, 1 Met. 6; *Johnson v. Com.*, 9 Bush 224; *Kean v. Com.*, 10 Bush 190; *Murphy v. Com.*, 1 Met. 305; *McDaniel v. Com.*, 6 Bush 326; *Patterson v. Com.*, 86 Ky. 313.

(21) **Grounds for new trial.** Under the Code of 1854 it was held that it was not necessary in the motion for a new trial to specify as one of the grounds the admission of incompetent testimony to which an exception had been taken. *Johnson v. Com.*, 9 Bush 224; and the same rule prevails under this Code. *Turnbull v. Com.*, 79 Ky. 495. The grounds for a new trial mentioned in this Code, sec. 271, are substantially the same as those mentioned in Code of 1854, sec. 267. This Code, sec. 340, authorizes a reversal for any error of law apparent on the record, if upon the whole case the court is satisfied that the substantial rights of the accused have been prejudiced thereby. The Code of 1854, sec. 334, provided that a judgment of conviction should only be reversed for the following errors: 1. An error of the

§ 341 ⁽³³⁵⁾ **Instructions to appear in bill of exceptions.** A judgment shall not be reversed for an error of the court in instructing or refusing to instruct the jury, unless the bill of exceptions contain all the instructions given by the court to the jury, and unless it shall thereupon appear that the law applicable to the case was not correctly and fairly given to the jury. (*See as to preparation of bill of exceptions, sec. 282.*)

§ 342 ⁽³³⁶⁾ **Death of accused terminates appeal.** No appeal shall be taken after the defendant's death, and upon his death an appeal taken during his life shall abate and shall not be revived.

circuit court in admitting or rejecting important evidence. 2. An error in instructing, or in refusing to instruct, the jury. 3. An error in failing to arrest judgment. 4. An error in allowing or disallowing a peremptory challenge.

(23) **Instructions**—how error in to be shown. Sec. 341 and notes.

(23) **New trial**—observe that exceptions or objections made for first time in motion for new trial will not be considered. Sec. 281 and notes.

(24) **Objection and exception both necessary.** In criminal as well as civil cases neither party can rely for reversal upon an erroneous decision made at instance of adverse party unless objection to motion or offer was made at time, and an exception taken, but where court acts on its own motion an exception alone is sufficient. *Branson v. Com.*, 92 Ky. 330.

(25) **Reversible errors.** Receiving verdict in absence of accused. *Temple v. Com.*, 14 Bush 769; and refusing to permit accused to remain on bail during trial for felony, when his liberty is necessary to enable him to prepare his case. *White v. Com.*, 80 Ky. 480; and permitting Commonwealth's attorney to state orally in the presence of the jury what rejected and incompetent evidence would be. *Flint v. Com.*, 81 Ky. 186; and refusing to grant a change of venue when the substantial rights of the accused have been prejudiced by the refusal. *Johnson v. Com.*, 82 Ky. 116; or continuance in certain cases, see note 7.

(26) On the trial of two boys fourteen years of age, the Court of Appeals reversed the judgment of conviction on

the ground that incompetent evidence was admitted, and because of improper argument of the Commonwealth's attorney; although no objection or exception was saved. *McClure v. Com.*, 81 Ky. 448; and see, as to trial of infants, *Willet v. Com.*, 13 Bush 230; *Heilman v. Com.*, 84 Ky. 457.

§ 341. (1) **Instructions.** A general exception to all the instructions is sufficient. *Williams v. Com.*, 80 Ky. 313; but the error in giving or refusing instructions must be specified as one of the grounds in the motion for a new trial. *Hopkins v. Com.*, 3 Bush 480; and the bill of exceptions should show that an objection was taken to the instructions. *Burns v. Com.*, 3 Met. 14.

(2) **Instructions**—statement as to, in bill of exceptions. Instructions given, but not embraced in the bill of exceptions, can not be considered although counsel consent that they may be considered. *Oder v. Com.*, 80 Ky. 32.

(3) Following the bill of evidence and exceptions, signed by the judge, are the following statements made by the clerk, to-wit: "Instructions given are as follows," and after this is what purports to be the instructions referred to. After this is the statement: "Instructions refused by the court are as follows," followed by what purports to be the instructions refused. The instructions were not properly made part of the record and can not be considered. *Mitchell v. Com.*, 78 Ky. 204.

(4) "The bill of exceptions shows that an instruction, designated as instruction No. 4, was given on motion of the Com-

§ 343 [337] **Effect of appeal by defendant in penitentiary.** If a judgment of confinement in the penitentiary have been executed before the certificate of the appeal is delivered to the sheriff whose duty it is to execute the judgment, the defendant shall remain in the penitentiary during the pendency of the appeal, unless discharged by the expiration of his term of confinement, or by pardon; and upon a reversal, if a new trial be ordered, shall be removed back from the penitentiary to the county jail from which he was brought, by the sheriff of said county.

§ 344 [338] **Removal of defendant from penitentiary after reversal.** Upon a mandate of reversal, ordering a new trial, being filed in the clerk's office of the circuit court in which the judgment of confinement in the penitentiary, which has been executed, was rendered, the clerk shall deliver to the sheriff a copy of the mandate, and a precept authorizing and commanding him to bring the defendant from the penitentiary to the county jail, which shall be obeyed by the sheriff and keeper of the penitentiary.

§ 345 [339] **Credit for confinement on second conviction.** If the defendant, upon the new trial, be again convicted, the period of his former confinement in the penitentiary shall be deducted, by the court, from the period of confinement fixed in the last verdict of conviction, or be allowed by the court in fixing the period of confinement, although such allowance reduce the period, for which the defendant is sentenced, below the shortest period prescribed by law as a penalty for the offense of which he has been found guilty; unless the period of confinement fixed in the verdict or by the court be for life.

monwealth. It is not, however, embodied in the bill of exceptions; and, although a paper purporting to be instruction No. 4 is copied into the record, there is no statement either by the clerk or court tending to identify it, we might, therefore, decline to consider it." *Weatherford v. Com.*, 10 Bush 196.

(4) "As the instructions asked by defendant are not copied in the record, being lost as stated by the clerk, it must be presumed that the ruling of the court in relation to them was right." *McDaniel v. Com.*, 6 Bush 326.

(5) The following statement is not sufficient to show that bill of exceptions contains all the instructions. "This being all the evidence, the attorney for the Commonwealth asked the court to

give the following instructions—going on to enumerate them—to each and all of which the defendant objected, but the court overruled the objection and defendant at the time excepted, and still excepts. The defendant then asked the court to give the following instructions, which the court gave—going on in like manner to set them out." *Clem. v. Com.*, 3 Met. 10; see *Jane v. Com.*, 3 Met. 18.

(6) "It is not necessary for the record to state, in terms, that all the instructions given were contained in the bill of exceptions. Any equivalent expression or any language or statement that would convey, with reasonable certainty, the same idea, would doubtless be held sufficient." *Jane v. Com.*, 3 Met. 18; 3 Met. 10.

§ 346 [240] **Affirmance of death penalty—proceedings.** When a judgment of death has been affirmed, the clerk of the Court of Appeals shall transmit to the governor a certificate of the affirmance and of the judgment of the circuit court, to the end that a warrant for the execution of the judgment may be issued by the governor. The governor shall send his warrant of execution by a special messenger, or by mail, to the proper officer, and shall name therein the day and time of execution, but shall not appoint an earlier day than that which had been fixed on by the circuit court. The officer receiving the same shall report his action both to the governor and the circuit court. If, from any cause, the execution do not take place on the day appointed by the governor, he may, from time to time, appoint another day for execution, until the sentence is carried into effect. (*See further as to execution of death penalty, secs. 293-297; and Ky. Stat., sec. 1137.*)

ARTICLE 2.

IN MISDEMEANORS.

- § 347. Jurisdiction of Court of Appeals.
- § 348. Time and manner of appealing by defendant.
- § 349. Execution not suspended unless bond executed.
- § 350. Time and manner of appealing by Commonwealth.
- § 351. Summons not necessary.
- § 352. Judgment of acquittal, when not to be reversed.
- § 353. Errors that authorize reversal.
- § 354. Attorney fee taxed as costs upon affirmance.
- § 355. Appeal in penal actions.
- § 356. Damages awarded on affirmance.

§ 347 [242] **Jurisdiction of Court of Appeals.** The Court of Appeals shall have appellate jurisdiction in penal actions and prosecutions for mis-

(7) The statement in the record that the defendant moved, "the following instructions" and that the Commonwealth moved "following" and that then "the court also gave to the jury the following instructions in lieu of those refused and in explanation of those given" was held sufficient to show that record contained all the instructions. *Smith v. Com.*, 1 Duv. 224; *Colley v. Com.*, 11 R. 346.

(8) A bill stating that "the court on motion of the Commonwealth's attorney instructed the jury as follows, to-wit"

(giving the instructions) and that "the court instructed the jury as follows on motion of defendant" (giving them) was held sufficient. *Mickey v. Com.*, 9 Bush 593.

(9) **Observe that bill of exceptions** must be prepared the same as in civil case, sec. 282; and see further, as to bill of exceptions and proper rule as to embodying therein the instructions, notes to sec. 335, Civil Code; form of bill, page 645.

§ 347. (1) **Appeal — jurisdiction.** The Court of Appeals has no jurisdiction in

demeanors, in the following cases only, viz.: If the judgment be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days; or, if the judgment be for the defendant, in cases in which a fine exceeding fifty dollars, or confinement exceeding thirty days, might have been inflicted.

§ 348 [344] **Time and manner of appealing by defendant.** The appeal must be prayed during the term at which the judgment is rendered, and shall be granted upon the condition that the record be lodged in the clerk's office of the Court of Appeals within sixty days after the judgment. (*Form of order, page 675.*)

§ 349 [344] **Execution not suspended unless bond executed.** The appeal shall not suspend the execution of the judgment, unless the defendant cause to be executed before the clerk of the circuit court a covenant, by good surety, to be approved by said clerk, for the payment, in case the judgment be affirmed, of the fine and costs and costs of the appeal and all damages thereon, and for the surrender of the defendant in execution of the judgment, if the judgment be for imprison-

ment unless the judgment be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days, or if the judgment be for defendant, in cases in which a fine exceeding fifty dollars or confinement exceeding thirty days might have been inflicted. *Anderson v. Com.*, 14 Bush 171.

(2) When judgment is rendered against defendants under an indictment for misdemeanor, they can not enter a motion for a new trial or prosecute an appeal unless they surrender themselves in execution of the judgment or supersede it. *Norton v. Com.*, 78 Ky. 501; see *Wilson v. Com.*, 10 Bush 526.

(3) An appeal may be prosecuted by the defendant from an order of the circuit court directing his name to be stricken from the roll of attorneys of such court upon charges of malpractice and official misconduct. *Turner v. Com.*, 2 Met. 619; and see, as to jurisdiction of appeals under the Code of 1854, *Com. v. Crump*, 18 B. M. 469; *Holden v. Com.*, 2 Bush 36.

(4) When the judgment convicts the defendant of an infamous offense and deprives him of the right to hold office he may appeal, although the fine imposed does not exceed fifty dollars.

Cheek v. Com., 87 Ky. 42; *Johnson v. Com.*, 90 Ky. 53.

(5) If the jury impose a less fine than fifty dollars, although the fine fixed by law is greater than that amount, the defendant can not appeal. *Johnson v. Com.*, 90 Ky. 53.

§ 348. (1) **Appeal—how taken, and when record must be filed.** Judgment upon verdict for misdemeanor was rendered against defendants. They prayed an appeal and executed supersedeas bond before the clerk of circuit court, but failed to file any transcript of the record or copy of the supersedeas bond, and obtain from the clerk of Court of Appeals a certificate that execution of the judgment was suspended. Held that there was no obstruction to the collection of the judgment in the lower court, and that having failed to file the transcript in time their appeal must be treated as abandoned. *Com. v. Howard*, 81 Ky. 57.

(2) The court has no jurisdiction of the appeal unless the record is lodged in the clerk's office of the Court of Appeals within sixty days after judgment. *Stratton v. Com.*, 84 Ky. 190; *Medcalf v. Com.*, 84 Ky. 485; *Mackey v. Com.*, 80 Ky. 345; *Com. v. Adams*, 16 B. M. 338; *Com. v. McCready*, 2 Met. 376.

ment, or on his failure so to surrender himself for the payment of a sum equal to two dollars for every day of imprisonment adjudged; and cause said covenant to be copied into the transcript: upon which being lodged with the clerk of the Court of Appeals, he shall issue a certificate that execution of the judgment is suspended. (*Form of bond, page 675; supersedeas, page 675.*)

§ 350 ⁽³⁴⁵⁾ **Time and manner of appealing by Commonwealth.** When the Commonwealth's attorney prays an appeal the clerk shall forthwith make and certify a complete transcript of the record, and transmit the same to the attorney-general, or deliver it to the Commonwealth's attorney for that purpose; and if the attorney-general, on inspecting the same, believe it proper to take the appeal, he shall do so, by filing the transcript in the clerk's office of the Court of Appeals, in sixty days after the judgment.

§ 351 ⁽³⁴⁶⁾ **Summons not necessary on appeal.** No summons is necessary on an appeal.

§ 352 ⁽³⁴⁷⁾ **Judgment of acquittal, when not to be reversed.** A judgment on a verdict of acquittal, of an offense the punishment of which is imprisonment, shall not be reversed.

§ 353 ⁽³⁴⁸⁾ **Errors that authorize reversal.** The judgment shall be reversed for any errors of law [appearing on the record when, upon con-

(3) An appeal must be taken during the term at which judgment is rendered. *Com. v. Adams*, 16 B. M. 338; and this rule applies whether the appeal be prayed by the Commonwealth or by the defendant. *Com. v. McCready*, 2 Met. 376.

(4) The provision requiring the record to be filed within sixty days after judgment can not be suspended by consent of parties. If time can be given until the next term to prepare and file a bill of exceptions it can only be done by withholding or suspending judgment. *Com. v. McCready*, 2 Met. 376.

(5) Motion for a new trial suspends the judgment, and if it be continued to the next term and then be overruled, an appeal may then be taken, and the record lodged in the clerk's office of the Court of Appeals within sixty days after the judgment is rendered overruling the motion for a new trial. An appeal can not be prosecuted until after the motion for a new trial has been disposed of. *Louisville Chemical Works v. Com.*, 8 Bush 179.

(6) The day on which the judgment was rendered must be included; where a judgment was rendered November 19th, and the record filed January 19th following it was held too late. *Wood v. Com.*, 11 Bush 220.

(7) A proceeding against the surety of a tavern-keeper to recover \$300 for a breach of the obligations of the tavern-keeper's bond, is not a misdemeanor, and does not come within that provision requiring the record to be filed in sixty days. *Margoly v. Com.*, 3 Met. 405.

(8) **Repeal of statute—effect of.** The repeal of a statute pending an appeal by one who has been convicted under it necessitates a reversal of the judgment and a dismissal of the action. *Speckert v. Com.*, 78 Ky. 287; but see *Ky. Stat.*, sec. 465; and *Waddell v. Com.*, 84 Ky. 276; *Com. v. Sherman*, 85 Ky. 686; *Com. v. Duff*, 87 Ky. 586.

§ 353. **Errors that authorize reversal.** The sufficiency of the evidence to prove the charge can not be inquired into on the appeal nor the judgment reversed upon

sideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby]. (*Words in brackets added by act 1880.*)

§ 354 [350] **Attorney's fee taxed as costs upon affirmance.** Upon the affirmance of a judgment, on the appeal of the defendant, an attorney's fee of twenty dollars shall be taxed as part of the costs of the appeal, to be equally divided between the attorney-general and the attorney for the Commonwealth, and upon the reversal of a judgment, upon an appeal by the Commonwealth, a fee of five dollars.

[So much of this section as divides the attorney's fee taxed as costs between the attorney-general and the attorney for the Commonwealth is hereby repealed, and said fee shall go to, and be for, the benefit of the attorney-general.] (*Words in brackets act of 1880. See as to fees and salary of attorney-general, Ky. Stat., sec. 117.*)

§ 355 [351] **Appeal in penal actions.** If the prosecution be by a penal action, the appeal shall be similar in all respects to appeals in civil actions.

§ 356 [352] **Damages awarded on affirmance.** If the execution of a judgment for a fine be suspended, as provided in this article, upon an affirmance of the judgment, damages at the rate of ten per cent shall be awarded against the defendant, [one-fourth of] which shall be for the use of the attorney-general. (*Words in brackets stricken out by act 1880. See as to compensation of attorney-general, Ky. Stat., sec. 117.*)

ARTICLE 3.

GENERAL PROVISIONS.

§ 357. Appeals in criminal cases take precedence.

§ 358. Time when appeals stand for trial.

§ 359. Time appeal in felony case stands for trial.

§ 360. Trial and decision at same term.

§ 361. Judgment for costs against defendant if he fail.

§ 357 [353] **Appeals in criminal cases take precedence.** Appeals in criminal cases shall take precedence over all other business of the court, and be placed first upon the docket for trial.

that ground. Nor will a misdemeanor judgment be reversed because the case was tried by less than twelve jurors, if the defendant consented to it (*Murphy v. Com.*, 1 Met. 365); nor because an erroneous instruction was given, if it was

not prejudicial to the accused. *Robinson v. Com.*, 16 B. M. 609; see further, notes to sec. 340.

§ 356. **Damages.** The Code of 1854 did not provide for damages upon the dismissal of an appeal. But it was held

§ 358 (354) **Time when appeals stand for trial.** They shall stand for trial at the first term succeeding the lodging of the transcript in the clerk's office of the Court of Appeals, provided it be so lodged ten days before the commencement of the term.

§ 359 (355) **Time appeal in felony case stands for trial.** When an appeal by the defendant in a case of felony is lodged within ten days before the commencement of the term, or during the term, it shall stand for trial on the tenth day after it is so lodged.

§ 360 (356) **Trial and decision at same term.** The appeal shall be decided at the same term at which it is tried.

§ 361 (357) **Judgment for costs against defendant if he fail.** On the affirmance of a judgment, if the appeal be taken by the defendant, and on the reversal of the judgment, if the appeal be taken by the Commonwealth, a judgment for costs shall be rendered against the defendant.

CHAPTER II.

TO CIRCUIT COURTS.

- § 362. Jurisdiction in cases of appeal.
- § 363. Commonwealth no appeal unless statutes authorize it.
- § 364. Appeal by defendant—how taken.
- § 365. Suspension of judgment by executing bond.
- § 366. Case tried *de novo*—when considered affirmed—costs.
- § 367. Attorney's fee and costs on affirmance.
- § 368. Judgment for defendant, money collected returned.
- § 369. Satisfaction of judgment bars appeal—time to appeal.
- § 370. Proceedings on appeal bond.

§ 362 (358) **Jurisdiction in cases of appeal.** If a judgment against a defendant on a trial before a county judge, or in a justice's court, or in a city or police court, unless otherwise provided in the statutes creating or regulating it, be for imprisonment or for a fine of twenty dollars or more, he shall have the right of appeal to the circuit court of the county in which the judgment is rendered. (*See as to jurisdiction of courts, page 547 of this Code.*)

§ 363 (359) **Commonwealth no appeal unless statutes authorize it.** The Commonwealth shall have no right of appeal from judgments of county

under that Code that the appellee was entitled to ten per cent damages upon the dismissal of an appeal. *Evans v. Com.*, 3 Bush 161; *M., I. & P. R. R. Co. v. Briscoe*, 18 B. M. 570.

§ 361. **Costs.** Defendant in a criminal prosecution must pay his own costs although he may be acquitted or have succeeded upon appeal. *Green v. Com.*, 93 Ky. 299; *Peoples v. Com.*, 88 Ky. 174.

judges, or of justices' courts, or of city and police courts unless otherwise provided in the statutes creating or regulating them. (*See page 551, for sections of Ky. Stat. relating to police courts.*)

§ 364 [300] **Appeal by defendant—how taken.** If a defendant desire to appeal from the judgment of a county judge, or of a justice's, city or police court, he shall obtain from the clerk of such court, or from the judge or justice, a copy of the warrant or summons, if any, and of the judgment, and a statement of the costs, and file them in the clerk's office of the circuit court, and cause to be executed, by good surety, to be approved by the clerk, a covenant to pay the costs of the appeal in the event of the affirmance of the judgment; and, if he desire to suspend the enforcement of the judgment, a further covenant to perform the judgment which may be rendered against him on the appeal; or, if the judgment be for imprisonment, and the defendant fail to surrender himself in execution thereof, to pay to the Commonwealth a sum equal to two dollars for each day of imprisonment adjudged, and thereupon the clerk shall docket the appeal with the other Commonwealth cases, and issue a certificate of the appeal; and, if the covenant be executed for that purpose, a certificate that the collection of the judgment is suspended, which certificates shall be served on the county judge, or justice, or on the clerk, of the city or police court, and, if an execution have been issued, on the officer to whom it was delivered. (*Form of bond, page 676; certificate, page 677.*)

§ 365 [300] **Suspension of judgment by executing bond.** After the service of a certificate of suspension, the judge, justice or clerk shall issue no other execution, and any officer on whom it is served shall return the execution in his hands as suspended by appeal. If a certificate of appeal only be served, the judge, justice or clerk shall indorse on any execution he may thereafter issue that the money collected thereon shall be paid into the circuit court in which the appeal is pending, and the officer shall pay any money that he may collect on any execution in his hands, or which he may thereafter receive, into such circuit court.

§ 366 [301] **Case tried de novo—when considered affirmed—costs.** Upon the appeal the case shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed if judgment for any amount be rendered against the defendant, and thereupon he shall be adjudged to pay the costs of the appeal.

§ 367 [302] **Attorney's fee and costs on affirmance.** Upon an affirmance an attorney's fee of ten per cent on the amount of the judgment shall

be taxed as part of the costs, and the costs in the justices' court shall be taxed as part of the costs of the appeal.

§ 368 [363] **Judgment for defendant, money collected returned.** If judgment be rendered for the defendant, any money paid into the circuit court, which has been collected of the defendant, on the original judgment, shall be forthwith returned to him.

§ 369 [364] **Satisfaction of judgment bars appeal—time to appeal.** No appeal shall be taken from a judgment of a county judge, or of a city, police or justices' court, after it is satisfied, nor after sixty days from the rendition thereof.

§ 370 [365] **Proceedings on appeal bond.** Upon a judgment being rendered against the defendant on an appeal, and an execution issued thereon, in one year from its rendition, being returned unsatisfied, a summons shall be issued by the clerk, at the request of the Commonwealth's attorney, against the surety on the appeal and suspending covenants, requiring him to appear on the first day of the next term of the circuit court, to show cause why judgment should not be rendered against him on said covenants, which summons shall be directed, delivered, served and returned as an ordinary summons in a civil action, and shall be docketed and stand for trial, and be tried as an ordinary civil action. If the surety have any defense thereto, he shall make it by answer, and the issues of law or of fact thereon shall be tried and decided.

TITLE X.

PROCEEDINGS TO PREVENT THE COMMISSION OF OFFENSES.

- CHAPTER I. SUPPRESSION OF RIOTS AND OF RESISTANCE TO LAWFUL AUTHORITY, 371.
 II. REQUIRING SECURITY TO KEEP THE PEACE, OR FOR GOOD BEHAVIOR, 382.
 III. ARREST AND CONFINEMENT OF INSANE, DRUNKEN AND DISORDERLY PERSONS, 394.
 IV. HABEAS CORPUS, 399.

CHAPTER I.

SUPPRESSION OF RIOTS AND OF RESISTANCE TO LAWFUL AUTHORITY.

- § 371. Resistance to officer—how overcome.
 § 372. Resisters and abettors—punishment of.
 § 373. Refusal to aid officer—punishment.
 § 374. Governor may send aid.
 § 375. Riots and unlawful assemblies—dispersement.
 § 376. Arrest of persons refusing to disperse.
 § 377. Refusal to aid officer in dispersing—punishment.
 § 378. Penalty against officer failing to do duty.
 § 379. Military may be called out.
 § 380. Military to obey civil officers.
 § 381. Rules for government of military.

§ 371 [307] **Resistance to officer—how overcome.** When a sheriff or other public officer authorized to execute process finds, or has reason to apprehend, that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he may think proper, and any military companies in his county, armed and equipped, to assist him in overcoming the resistance, and in arresting and confining the resisters and their aiders and abettors, to be punished according to law.

§ 372 [308] **Resisters and abettors—punishment of.** The officer must report to the court from which the process issued the names of the resisters and their aiders and abettors, that they may be punished for contempt.

§ 373 [309] **Refusing to aid officer—punishment.** Every person commanded by a public officer to assist him in the execution of process, who, without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor and contempt of the court from which the process issued. (*See further as to penalty, Ky. Stat., sec. 1340.*)

§ 374 [310] **Governor may send aid.** If it appear to the governor that the power of the county is not sufficient to execute process, he must, on

application of the sheriff, order such a military force from any other county or counties as may be necessary. (*See further as to when militia may be called out, Ky. Stat., sec. 2672.*)

§ 375 [372] **Riots and unlawful assemblies—dispersements.** When persons to the number of twenty or more are unlawfully or riotously assembled in a city or town, the sheriff of the county and his deputies, and the other peace officers and magistrates of such city or town, together with the mayor or other chief officer of the city or town, must go among the persons assembled, or as near them as possible, and, in the name of the Commonwealth, command them to disperse.

§ 376 [373] **Arrest of persons refusing to disperse.** If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, or cause them to be arrested, that they may be punished according to law, and may command to their aid all persons present or in the county. (*See for penalty, Ky. Stat., sec. 1268.*)

§ 377 [374] **Refusal to aid officer in dispersing—penalty.** If the persons commanded to aid the magistrates and officers neglect to do so without just cause, they shall be treated as part of the rioters, and punished accordingly.

§ 378 [375] **Penalty against officer failing to do duty.** If a magistrate or officer named in section three hundred and seventy-five, having notice of an unlawful or riotous assembly, neglect to proceed to the place of assembly, or as near as he can with safety, and to exercise the authority invested in him to suppress the same and arrest the offenders, he is guilty of as misdemeanor.

§ 379 [376] **Military may be called out.** If the unlawful assembly have the intent of committing a felony, or of offering violence to person or property, or to resist by force the laws, the judge of the circuit court, or the judge of the county court, or the mayor or chief officer of the city, or the sheriff of the county, or any two justices of the peace, may, by an order directed to a commanding officer of the militia, or of a military company, direct such military force under his command as shall be specified, to appear at a specified time and place, armed and equipped, to aid the civil authorities in suppressing violence and enforcing the law, which order shall be forthwith obeyed by the commanding officer and troops. (*See further as to when military may be called out, Ky. Stat., sec. 2672.*)

§ 380 [377] **Military to obey civil officers.** When an armed force is called out to suppress an unlawful or riotous assembly, it must obey the orders of the civil officers named in the last section. (*See to same effect, sec. 2673, Ky. Stat.*)

§ 381 [377] **Rules for government of military.** The commanding officer must act on the defensive, and only permit the troops to use their edged or pointed weapons to repel violence, except in the following cases:

1. If an attack be made on the troops, or any one of them, by which his life is endangered, they may defend themselves by discharging their fire-arms; and when the attack is general, the commanding officer may order the troops to fire.

2. If the troops can not be placed between the rioters and the persons or property they are intending to attack, and the illegal purpose of the riot be persisted in by means dangerous to the lives or property of others, the magistrates and officers mentioned in section three hundred and seventy-nine, or any two of them, may direct the commanding officer to disperse the rioters, which he is authorized to do, by ordering the troops, first to use the bayonet and sword, and if they prove ineffectual, but not otherwise, to discharge their fire-arms against them.

3. The troops must not be brought on the ground until the magistrate or officer has proclaimed the office which he holds, and commanded the assembly to disperse, and every endeavor must be used by the magistrates and civil and military officers to induce, or force, the rioters to disperse before an attack is made on them. (*See further, Ky. Stat., sec. 2695.*)

CHAPTER II.

REQUIRING SECURITY TO KEEP THE PEACE, OR FOR GOOD BEHAVIOR.

- § 382. Grounds for requiring bond to keep peace.
- § 383. Arrest of person accused.
- § 384. Trial and bond.
- § 385. Time for which security may be required.
- § 386. Bond to be returned to circuit court clerk.
- § 387. Trial in circuit court, bond may be required.
- § 388. Magistrate may take bond after commitment.
- § 389. Defendant discharged if prosecutor fail to appear.
- § 390. Defendant to be discharged unless guilt shown.
- § 391. Breaches of bond—what are.
- § 392. Proceedings when bond broken.
- § 393. Security may be by recognizance.

§ 382 (371) **Grounds for requiring bond to keep the peace.** A person may be arrested for the purpose of requiring of him security to keep the peace, or for his good behavior, in the following cases:

1. Upon the complaint on oath, of a person threatened, to a magistrate, that the defendant has threatened to commit an offense against his person or property, and upon the magistrate being satisfied, by examination on oath of the complainant or others, that there are reasonable grounds to fear the commission of the offense threatened.

2. Upon information given on oath to a magistrate, by any person, that the defendant is about to commit violence endangering human life, or is about to commit an offense amounting to a felony, and the magistrate being satisfied, by an examination on oath of the informant or others, that there are reasonable grounds for apprehending the commission of such violence or felony.

3. If a magistrate or court be satisfied, by the conduct or words of a person in the presence of such magistrate or court, or from proof given before such magistrate or court, that there are reasonable grounds for apprehending that such person will commit an offense against the person or property of another. (*Who are magistrates, sec. 26.*)

§ 382. (1) **Bond to keep peace.** In a proceeding against the surety in bond given to keep the peace, when the record does not show the evidence, it will be presumed that a bond to keep the peace was properly required. *Rankin v. Com.*, 9 Bush 553.

(2) See further, as to rights and powers of magistrate when person is brought before him, charged with a breach of the peace or on a peace warrant, *Pepper v. Mayes*, 81 Ky. 673.

§ 383 [379] **Arrest of person accused.** If the defendant be in the presence of the court or magistrate, a peace officer shall be verbally directed by the court or magistrate to take him into custody. If not in the presence of the magistrate, he shall issue a warrant of arrest, directed to any peace officer of the county, or city, or town, commanding him to arrest the defendant and bring him before the magistrate. The complaint, information or proof shall be briefly recited in the warrant. (*Form of warrant, page 661 ; who are peace officers, sec. 26.*)

§ 384 [380] **Trial before magistrate—bond may be required.** Upon the defendant being brought before the magistrate, or being taken into custody by order of a court or magistrate, the court or magistrate shall hear the evidence which may be produced on either side; and if satisfied that there are reasonable grounds for apprehending that the defendant will commit an offense against the person or property of another, or will commit violence endangering human life, or an offense amounting to felony, may require of him surety to keep the peace, or for his good behavior, in a sum not exceeding five thousand dollars, if human life be endangered, or one thousand dollars in other cases; and in default of giving such surety, may commit the defendant to jail, for a period not exceeding three months, unless he shall, in the meantime, give such surety. (*Form of bond, page 661 ; order of commitment, page 662 ; recognizance may be taken, sec. 393.*)

§ 385 [381] **Time for which security may be required.** The security required by a circuit, county or police court may be for keeping the peace, or for good behavior, for any length of time not exceeding one year. If it be required by a magistrate, it shall be for keeping the peace, or for good behavior, until the defendant shall appear before the circuit court of the county, on the first day of its next term, before which court the defendant shall also be bound, with surety, to appear, and not depart without leave of the court.

§ 386 [382] **Bond to be returned to circuit court clerk.** The magistrate shall return the bond of the defendant and his surety for his appearance and keeping the peace, to the clerk of the circuit court, before its next term.

§ 387 [383] **Trial in circuit court—bond may be required.** Upon the defendant appearing, the court shall examine the case, and either discharge the defendant or require surety to keep the peace, or for his good behavior, for a period not exceeding one year; and, in default of giving such surety, may commit the defendant to jail for a period to be fixed by the court, not exceeding three months, unless he shall, in the meantime, give security. If a defendant be committed to jail for

failure to give bond as above provided, the cause of commitment, and the sum in which he is required to give security, shall be stated in the written order of commitment, which shall be delivered to the jailer. (*Form of bond, page 662; order of commitment, page 662; recognizance may be taken, sec. 393.*)

§ 388 [384] **Magistrate may take bond after commitment.** Any magistrate or court of the county may take the surety required by the foregoing provisions of a defendant committed to jail, for default of giving such security. (*Who are magistrates, sec. 26.*)

§ 389 [385] **Defendant discharged if prosecutor fail to appear.** If the proceedings be taken upon the complaint of the person threatened, if he fail to appear before the court or magistrate, the defendant shall be discharged.

§ 390 [386] **Defendant to be discharged unless guilt shown.** Unless the court or magistrate be satisfied that there are reasonable grounds for believing that the defendant will commit an offense against the person or property of another, or commit violence endangering human life, or an offense amounting to felony, he shall be discharged.

§ 391 [387] **Breaches of the bond—what are.** The following are breaches of the bond required in this chapter:

1. The failure of the defendant to appear in the circuit court, if the bond require such appearance, or departing therefrom before he is lawfully discharged.

2. A judicial conviction of the defendant of an offense involving a breach of the peace, within the period specified in the bond.

3. A judicial conviction of the defendant of a felony within the time specified in the bond, if the bond be for his good behavior.

§ 392 [388] **Proceedings upon breach of bond.** The attorney for the Commonwealth may proceed by action, in the name of the Commonwealth, against the defendant and his surety, upon a breach of the bond.

§ 393 [389] **Security may be by recognizance.** If the security required in this chapter be given in court, it may be by a recognizance entered into in open court, and entered upon the records by the clerk. (*Form of recognizance, page 662.*)

§ 391. **Violation of bond.** A conviction of the offense of drunkenness and disorderly conduct is not necessarily a conviction of an offense involving a breach of the peace, and does not authorize a

forfeiture of a bond "to keep the peace and be of good behavior" without a direct proceeding to forfeit the bond. *Rankin v. Com.*, 9 Bush 553.

CHAPTER III.

ARREST AND CONFINEMENT OF INSANE, DRUNKEN AND DISORDERLY PERSONS.

§ 394. Insane or drunken persons to be arrested.

§ 395. Disorderly persons to be arrested.

§ 396. Disposition of person arrested.

§ 397. Insane person, how disposed of.

§ 398. Drunk or disorderly person, how disposed of.

§ 394 [390] **Insane or drunken person to be arrested.** It shall be the duty of all peace officers to arrest any insane or drunken person whom they may find at large, and not in the care of some discreet person, and carry him before some magistrate of the county, city or town in which the arrest is made. (*Who are peace officers, sec. 26.*)

§ 395 [391] **Disorderly persons to be arrested.** It shall also be the duty of all peace officers to arrest any disorderly person whom they may find creating a disturbance by noise or other disorder, and carry him before some magistrate of the county, town or city in which the arrest is made. (*Who are magistrates, sec. 26.*)

§ 396 [392] **Disposition of person arrested.** If the arrests authorized in the last two sections be made during the night, the officer shall keep the persons arrested in confinement until the next morning, unless, in the case of an insane or drunken person, he deliver him into the custody of some discreet person, who will undertake to restrain and take care of him; and if the arrest be made in the local jurisdiction of a police or city court, the persons arrested shall be carried before the judge of such court unless he be absent.

§ 397 [393] **Insane person, how disposed of.** The magistrate before whom an insane person is brought shall make such orders as may be necessary to keep him in restraint, until he can be sent, by due process of law, to the lunatic asylum; and if such insane person have not friends to whose custody or care the magistrate can commit him, he may order him to be confined in the county or city jail, and shall immediately give notice thereof to the city or county attorney, whose duty it shall be to take the proper proceedings for having the insane person sent to the lunatic asylum.

§ 398 [394] **Drunk or disorderly person, how disposed of.** Upon a drunken person being brought before a magistrate, he shall have power to

§ 394. **Drunken person.** It is the duty of a peace officer to arrest any drunken person who is at large and not in the

care of some discreet person. *Wing v. Com.*, 7 R. 210.

order him to be confined until he become duly sober; and upon a disorderly person being brought before him, the magistrate may require of him surety for his good behavior and for keeping the peace for a period not exceeding one year; and on his failure to give such surety, may commit him until he gives security, but in no event is the confinement to exceed thirty days. (*Form of bond, page 662; order of commitment, page 662.*)

CHAPTER IV.

HABEAS CORPUS.*

- § 399. Causes for and officers who may issue writ.
- § 400. Signature to and officer to whom returnable.
- § 401. Penalty for refusing to issue writ.
- § 402. Direction and form of writ—when returnable.
- § 403. Return day may be changed.
- § 404. Bond may be required before writ issued.
- § 405. Officer granting writ may order person detained taken.
- § 406. Writ—how and by whom executed.
- § 407. Service of writ if party conceal himself.
- § 408. Return of writ—change of return day.
- § 409. Penalty for refusal to obey.
- § 410. Response to writ—what it must state.
- § 411. Person detained must be produced—exception.
- § 412. Person detained need not be produced—when.
- § 413. Affidavits may be read on trial.
- § 414. Witness' attendance, how secured—enforcement of judgment.
- § 415. Officer interested or related not to preside.
- § 416. Officers to whom writ may be returned.
- § 417. Notice to defendant of officer writ returned to.
- § 418. Objection to officer presiding—practice.
- § 419. Issue—how formed.

* (1) **Habeas corpus.** A justice has no power to issue a writ of *habeas corpus* when a circuit, chancery, police or county judge is in the county, and if a justice does issue the writ when any of those officers are in the county, it is a nullity and may be disregarded. A person in jail is not entitled to a writ of *habeas corpus*, as of course. It is a discretionary writ to be issued only upon probable cause being shown, and if it appears upon the face of the petition therefor that there is no sufficient ground for the release of the prisoner, the writ will be denied. *Bethuram v. Black*, 11 Bush 628.

(2) A party was convicted and prayed an appeal, pending which he obtained his discharge on a writ of *habeas corpus* issued and tried by a police judge; the circuit judge properly disregarded the action of the police judge in ordering judgment to be executed. *Haggard v. Com.*, 79 Ky. 366.

(3) No appeal lies from the decision of the judge of an inferior court upon a writ of *habeas corpus*. *Gill on Petition*, 92 Ky. 118.

(4) Judgment upon a writ discharging a defendant, although improper, released his bail. *Smith v. Com.*, 91 Ky. 588.

- § 420. Trial, judgment and costs.
- § 421. Paper and proceedings to be returned.
- § 422. Person released not to be imprisoned for same cause—exception.
- § 423. Proceedings if person guilty of public offense.
- § 424. Writ may issue against religious or other association.
- § 425. Causes for removing prisoner from custody.
- § 426. Trial of writ if examining court refuse bail.
- § 427. Issual and service on any day—powers of person executing.
- § 428. Civil suit not affected by proceedings.
- § 429. Second writ may issue—judge who may try.

§ 399 [395] **Causes for and officers who may issue writ.** The writ of *habeas corpus* shall be issued upon petition on behalf of any one showing, by affidavit or otherwise, probable cause to believe he is detained without lawful authority, or is imprisoned when by law he is entitled to bail.

1. By any judge of a circuit, criminal, chancery or common pleas court.

2. By a judge of a county, city or police court, when all the judges mentioned in subsection one are, at the time, absent from the county; or,

3. By a justice of the peace, when all the judges mentioned in subsections one and two are, at the time, absent from the county.

The power of a judge of a circuit, criminal, chancery or common pleas court to issue writs of *habeas corpus* shall be coextensive with the State. That of the other officers above enumerated shall extend only to the limits of their respective counties, cities or towns. (*Second writ may issue, sec. 429.*)

§ 400 [396] **Signature to and officer to whom returnable.** The writ shall be signed by the officer granting it, and be made returnable before one of the judges mentioned in subsection one of section three hundred and ninety-nine, of the county in which the writ is served. (*See further as to officer to whom returnable, secs. 408, 416, 426.*)

§ 401 [397] **Penalty for refusal to issue writ.** If any officer authorized to grant the writ shall, when legally applied to, refuse to issue it, he shall forfeit and pay, to the person in whose behalf it was applied for, five hundred dollars.

§ 402 [398] **Direction and form of writ—when returnable.** The writ must be directed to the person having custody of, or restraining, the person in whose behalf the application is made, and must command him to have the body of such person, at the court-house of the county in which the writ is served, before the officer before whom the writ is made returnable, at a time therein specified. It must be made returnable so soon as may be. (*Form of writ, page 678.*)

§ 403 [395] **Return day may be changed.** If the writ be served before the return day thereof, but at such time as makes it impossible to make return to the writ, at the time required by it, the person serving the writ may, by an indorsement on it and on the copy served, order the person to whom the writ is directed to make return to it, at a time subsequent to that mentioned in the writ, but not exceeding three days from the time of the service of the writ. Such indorsement shall be part of the writ. (*Form of indorsement, page 678; and see further, sec. 408.*)

§ 404 [395] **Bond may be required before writ issued.** The officer granting the writ may previously require bond with surety in sufficient penalty, to the Commonwealth or the person to whom the writ is directed, conditioned that the person detained shall not escape by the way, and for the payment of such costs and charges as may be awarded against him. The bond shall be filed with the other papers and proceedings in the court, and may be sued on by the Commonwealth, for the benefit of any one injured by the breach of it. (*Form of bond, page 678.*)

§ 405 [395] **Officer granting writ may order person detained taken.** When the person in whose behalf the writ is applied for shall not be in the custody of a jailer or other public officer, the officer granting the writ may, for good cause shown, direct the person serving it to take the person detained into his custody and produce him on the return of the writ.

§ 406 [395] **Writ—how and by whom executed.** The writ shall be served by any qualified officer, or by any private person designated by the officer issuing it, on the person to whom it is directed; or, if he be absent from the place where the person in whose behalf it is issued is detained, on the person having him in immediate custody, by leaving a copy of the writ with either of them.

§ 407 [395] **Service of writ if party conceal himself.** If the person to whom the writ is directed conceal himself, or refuse admittance to the party attempting to serve the same, it may be served by affixing a copy of the writ on some conspicuous place on the outside of his dwelling-house, or of the place where the party is confined or detained.

§ 408 [395] **Return of writ—change of return day.** The person serving the writ shall return it to the proper officer, and, if the time for the return to the writ has been changed, shall, as soon as may be, deliver to the person on whose application it was issued a copy of the indorsement changing the time of return. (*Form of notice that time has been changed, page 678.*)

§ 409 [398] **Penalty for refusing obedience to writ.** If the person to whom the writ is directed refuse, after service, to obey the same, he shall pay one thousand dollars to the person in whose behalf it was issued, and the officer to whom it is returned must issue an attachment against such person, directed to any peace officer, commanding him forthwith to apprehend and bring such person immediately before him, and, upon being so brought, he must be committed to the jail of the county, until he makes due return to such writ, or is otherwise legally discharged. (*Form of attachment, page 679.*)

§ 410 [399] **Response to writ, what it must state.** The person on whom the writ is served must state in his return, plainly and unequivocally:

1. Whether he has or has not the party in his custody, or under his power or restraint.

2. If he has the party in his custody or power or under his restraint, he must state the authority for and cause of such imprisonment or restraint.

3. If the party be detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the officer presiding on the hearing of such return.

4. If the person on whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of *habeas corpus*, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause and by what authority such transfer took place.

5. The return must be signed by the person making the same, and, except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath.

§ 411. **Person detained must be produced—exception.** The person to whom the writ is directed, if it be served, must bring the body of the party in his custody or under his restraint, according to the command of the writ, except in the cases specified in the next section.

§ 412 [398] **Person detained need not be produced—when.** When, from sickness or infirmity of the person directed to be produced, he can not, without danger, be brought before the officer to whom the writ is returned, the person in whose custody or power he is may state that fact in his return to the writ, verifying the same by affidavit. If the officer trying the case be satisfied of the truth of such return, and the return to the writ be otherwise sufficient, the officer may proceed

to decide on such return, and to dispose of the case as if such party had been produced, or the hearing thereof may be adjourned until such party can be produced.

§ 413 [398] **Affidavits may be read as evidence on trial.** In the discretion of the officer before whom the writ is returned, affidavits of witnesses taken by either party, on reasonable notice to the adverse party, his agent or attorney, may be read as evidence on the trial of the return.

§ 414 [399] **Witness' attendance, how secured—enforcement of judgment.** The officer issuing the writ, and the one before whom it is returned for trial, shall have power to issue subpoenas for witnesses, and the last-named officer shall have the same power to compel the attendance of witnesses, or to punish a contempt of his authority, as a court of record has; and his judgment on the trial of the writ shall be considered and be enforced, as if it were a judgment of such court. (*How attendance of witnesses coerced, see secs. 537, 538 Civil Code.*)

§ 415 [400] **Officer interested or related not to preside.** No judge or justice of the peace shall be qualified to preside upon the trial of a return to a writ of *habeas corpus*, who is related by consanguinity or affinity to the person on whose behalf, or against whom, the writ is granted, or who is in any manner personally interested in the release or detention of the person held in custody.

§ 416 [401] **Officer to whom writ may be returned.** If the judge before whom the writ is made returnable be absent from the county at the time, or be not qualified or able to act, the person serving the writ shall return it to any of the judges mentioned in subsection one of section three hundred and ninety-nine, who is in the county at the time, qualified and able to act; or, if there be none such in the county at the time, he shall return it to the judge of the county court, if he be at the time in the county and qualified and able to act; or, if the judge of the county court be not in the county at the time, or be not qualified or able to act, he shall return it to a police judge of the city or town which is the county seat, if there be one at the time in the county, qualified and able to act, and if there be no such police judge at the time in the county, he shall return it to the justice of the peace residing nearest the court-house who is at the time in the county, qualified and able to act.

§ 417. **Notice to defendant of officer writ returned to.** If the writ be returned to any other officer than the one before whom it is made returnable, the person serving it shall at once notify the defendant of the officer to whom he has returned the writ, and thereupon it shall be the duty of the defendant to make his return to the writ before such officer.

§ 418. **Objection may be made to officer presiding at trial.** The party upon whose application, or the party in whose behalf, the writ is issued; or the party against whom it is issued, except where the person in custody is held upon a charge of having committed a public offense, may file his affidavit, with the judge or justice proceeding to try the case, in substance that he believes the judge or justice will not impartially try the case; and, if such affidavit be filed, the judge or justice objected to shall not preside at the trial; but the person who served the writ shall forthwith notify, in the order in which he is directed to return the writ, a judge or justice who may be in the county and qualified and able to sit. It shall be the duty of the judge or justice thus notified to appear at once and try the case. He shall have all the powers the officer before whom the writ is made returnable could have exercised. Neither party shall have the right to file an affidavit objecting to more than one judge or justice.

§ 419 (300) **Issue—how formed.** The party brought before the judge or justices on the return of the writ, or the person on whose application the writ is issued, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show that his imprisonment or detention is unlawful, or that he is entitled to his discharge.

§ 420 (301) **Trial—judgment and costs.** The judge or justice must thereupon proceed, in a summary way, to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require; and adjudge the costs of the proceeding, including the charge for transportation of the prisoner or party detained, to be paid as shall seem right, and make such orders as may be proper. The payment of the costs may be enforced by attachment or otherwise by the court to which the proceedings are returned. (*See further as to costs, Ky. Stat., sec. 902.*)

§ 421 (302) **Papers and proceedings to be returned.** The papers and proceedings upon a writ of *habeas corpus* shall be returned to the clerk of the circuit court of the county in which the writ was heard, or to the court in which the prosecution, if any, is pending.

§ 422 (303) **Person released not imprisoned for same cause—exception.** A person delivered upon a writ of *habeas corpus* shall not again be imprisoned or committed for the same offense except by the legal order or process of the court, wherein he shall be bound by recognition to appear, or of some other court having jurisdiction of the same cause.

423 [398] Proceedings if person guilty of public offense. Upon the trial of a *habeas corpus*, if the judge or other officer shall be of opinion that the prisoner has been guilty of a misdemeanor or felony, for which such prisoner may be liable to be tried, and that the proceedings against him are so defective that he can not be detained upon them, the judge or other officer shall admit him to bail, if he be entitled to bail, to appear at the court having jurisdiction over the case, or remand him to the custody of the proper officer, to be conveyed to the proper county for new proceedings to be had against such prisoner.

§ 424 [398] Writ may issue against religious or other association. Writs of *habeas corpus* shall issue upon the application of the husband, father, mother, guardian or next friend of any married woman or infant detained by any religious or other association, or by persons acting under the authority of such association. The county attorney, where such detention is made, shall prosecute such writ without fee, if required to do so.

§ 425 [398] Causes for which prisoner removed from custody. A person committed to prison, or in custody of an officer, for any criminal offense, shall not be removed from said prison, or delivered to the custody of any other officer, except in the following cases :

1. By writ of *habeas corpus*, or some other legal writ.
2. When he may be delivered to an officer to be removed to some common jail.
3. In case of fire, infectious disease or other great necessity.
4. When the prisoner is charged, by affidavit, with treason or felony, committed in some other State or Territory of the United States of America; in which case he shall, on the demand of the executive of such State, or the governor of a Territory in the United States, from which he fled, be sent thither in custody, by the order of any circuit court, or judge thereof; or may be bound by recognizance, with good surety, by said court or judge, to appear at the proper time and place, and surrender himself to the court or tribunal having jurisdiction of the offense, if the said court or judge shall, upon consideration of the evidence, be of opinion he should be put upon his trial.

§ 426. Trial of writ if examining court refuse bail. If an examining court fail to grant bail to a person charged with the commission of a public offense, no writ of *habeas corpus*, because of imprisonment under the order of such court, shall be made returnable before, or tried by, any other officer than the judge of the court before which he is held to answer.

§ 427. **Issual and service on any day—powers of person executing.** Any writ or process authorized by this chapter may be issued and served on any day or at any time; and if a private person be authorized to serve the writ, he shall have the same powers as a sheriff in the execution of the writ. (*See further as to powers of officer, Ky. Stat., sec. 4583.*)

§ 428. **Civil suit not affected by proceedings.** The proceedings and judgment upon the writ of *habeas corpus* shall not conclude, or be evidence in, any civil suit involving the rights decided by the order or judgment on the writ of *habeas corpus*.

§ 429. **Second writ may issue—judge who may try.** The judgment upon a trial under a writ of *habeas corpus* shall not prevent the issuing of another writ for the same cause, nor be given in evidence on the trial under a second writ; but no officer, except the judge of a circuit, criminal, chancery or common pleas court, shall try a writ of *habeas corpus* who has tried a former writ issued for the same cause.

TITLE XI.

IMPEACHMENT.

[SEE CONSTITUTION, SEC. 66, AND KY. STAT., SEC. 2172, FOR OTHER PROVISIONS.]

- § 430. Impeachment defined.
- § 431. Articles of impeachment.
- § 432. Articles must state grounds.
- § 433. Committee to be appointed to prosecute.
- § 434. Senate to appoint day for trial—accused summoned.
- § 435. Process to issue for production of testimony.
- § 436. Witnesses' attendance may be coerced.
- § 437. Privileges and pay of witnesses.
- § 438. Oath to be taken by senators.
- § 439. Absence that prevents senator from voting on final decision.
- § 440. Costs against unsuccessful party.
- § 441. Prosecutor—when liable for costs.

§ 430 [300] **Impeachment defined.** An impeachment is the prosecution, by the House of Representatives, before the Senate, of the governor or other civil officer, for misdemeanor in office.

§ 430. **Impeachments.** See *Low v. Com.*, 3 Met. 237; *McBride v. Com.*, 4 Bush 331; *Brown v. Grover*, 6 Bush 1; *Curry v. Stewart*, 8 Bush 560; *Com. v. Will-*

iams, 79 Ky. 42. These cases are not directly in point, but they illustrate the question; and see Constitution, secs. 66-69.

§ 431 ^[397] **Articles of impeachment.** The articles of impeachment are the written accusation of the officer, drawn up and approved by the House of Representatives.

§ 432 ^[398] **Articles must state grounds.** The articles of impeachment shall state with reasonable certainty the misdemeanor in office for which the officer is impeached; and if there be more than one they shall be stated separately and distinctly.

§ 433 ^[399] **Committee to be appointed to prosecute.** When the articles of impeachment have been approved by the House of Representatives, and an impeachment ordered, a committee shall be appointed to prosecute it, whose chairman, within five days, shall lay the same before the Senate.

§ 434 ^[400] **Senate to appoint day for trial—accused summoned.** The Senate shall appoint a day for hearing the impeachment, and the accused shall be summoned, by a precept issued by the clerk of the Senate, to appear on that day. The precept shall be served by delivering a copy of the precept and of the articles of impeachment to the accused in person, if to be found, or leaving the copies at his residence with some white member of his family over sixteen years of age.

§ 435 ^[401] **Process to issue for production of testimony.** The clerk of the Senate, at the request of the chairman of the committee appointed to prosecute, or of the accused, shall issue process for summoning witnesses, and for producing books and papers; and in case of disobedience of the process, the Senate shall order the clerk to issue process for arresting the witnesses and seizing the books and papers, which process may be executed by the peace officers of the several counties, or by officers specially appointed for that purpose by the Senate.

§ 436 ^[402] **Witnesses' attendance may be coerced.** The Senate shall have power of coercing the attendance of witnesses, and of compelling them to testify, and of coercing the production of books and papers, by fine and imprisonment, to such an extent as may be necessary.

§ 437 ^[403] **Privileges and pay of witnesses.** Witnesses shall have the same compensation for travel and attendance, and the same exemptions in going, remaining and returning as witnesses in the circuit courts, and officers executing the process and orders of the Senate shall have like fees for their services.

§ 438 ^[404] **Oath to be taken by senators.** Before the Senate proceeds to try the impeachment, the Speaker and every senator present shall take the following oath or affirmation: "I do solemnly swear (or

affirm) that I will faithfully and impartially try the impeachment against A B, and give my decision according to the law and evidence."

§ 439 [405] **Absence that prevents senator from voting on final decision.** The Senate shall determine what amount of absence of a senator during the trial shall exclude the senator from voting on the final decision.

§ 440 [406] **Costs against unsuccessful party.** If the accused be acquitted, he shall be entitled to his costs, to be taxed by the clerk of the Senate and paid by the treasurer; and if convicted he shall pay the costs, to be taxed by the clerk and recovered by motion, by the attorney-general, in the Franklin Circuit Court, at the first term thereof, without notice, or afterward on notice.

§ 441 [407] **Prosecutor—when liable for costs.** If the impeachment be prosecuted on the petition of some citizen of the Commonwealth, whose name is set at the foot of the article of impeachment, he shall be liable for the costs of the accused if he be acquitted, and also for the costs of prosecuting the impeachment, and in that case the Commonwealth shall not be liable to pay any part of the costs; and if the accused be convicted, the petitioner shall be entitled to recover of the accused the costs of the impeachment, for which he is liable; the costs to be taxed by the clerk of the Senate, and recovered by suit in a court of competent jurisdiction.

TITLE XII.

PROCEEDINGS FOR THE REMOVAL FROM OFFICE OF CLERKS OF COURTS.

[SEE FURTHER, AS TO REMOVAL OF CLERKS, CONSTITUTION, SEC. 124.]

§ 442. Clerks Court of Appeals may remove and causes for.

§ 443. Prosecutor necessary—requisites of information.

§ 444. Time of trial—issuall and service of summons.

§ 445. Witnesses' attendance—how secured.

§ 446. Postponement of trial.

§ 447. Prosecutor to secure costs.

§ 448. Costs against unsuccessful party.

§ 449. Prosecutor—when not necessary.

§ 450. Clerk pro tem. may be appointed.

§ 442 [408] **Clerks Court of Appeals may remove and causes for.** Clerks of the Court of Appeals and clerks of circuit, county and police and city

§ 442. **Removal of clerks.** See Constitution, sec. 124; and Com. v. Rodes, 6 B. M. 174; Com. v. Arnold, 3 Litt. 300; Com. v. Rodes, 1 Dana 595.

courts may be removed from office by the Court of Appeals, upon a written information signed and presented in said court by the attorney-general, charging the following causes of removal:

1. Any act, omission or neglect by such clerk, for which the statutes have prescribed a forfeiture of office.

2. Any malfeasance in office or neglect of official duty that the court may consider sufficient cause of removal.

§ 443 ⁽⁴⁰⁹⁾ **Prosecutor necessary—requisites of information.** Except in the case provided in section four hundred and forty-nine, there shall be a prosecutor responsible for costs named in the information. The information shall state the offense charged with the certainty required in an indictment; and if there be more than one offense they shall be stated separately and directly.

§ 444 ⁽⁴¹⁰⁾ **Time of trial—issuall and service of summons.** Upon the information being presented, the court shall fix a day of trial and the clerk of the Court of Appeals shall issue a summons warning the defendant to appear on that day and answer the information. The summons shall be served by delivering a copy of the summons and of the information to the defendant, if he be found, and if not, to any deputy or white person remaining in his office by his employment, and if there be none, then by affixing such copies to the door of the clerk's office of the defendant.

§ 445 ⁽⁴¹¹⁾ **Witnesses' attendance, how secured.** The clerk of the Court of Appeals shall, on request of the attorney-general or of the defendant, issue subpoenas for witnesses, and the court may order process for the production of books and papers, and may compel obedience to the subpoenas and other process, and compel witnesses to testify, by fine and imprisonment, to the same extent as circuit courts.

§ 446 ⁽⁴¹²⁾ **Postponement of trial.** The court may grant continuances or postponement of the trial for sufficient cause.

§ 447 ⁽⁴¹³⁾ **Prosecutor required to secure costs.** If the court be satisfied that the prosecutor is insolvent, or a non-resident, security for the costs may be required.

§ 448 ⁽⁴¹⁴⁾ **Costs against unsuccessful party.** If the court render a judgment of removal from office against the clerk, a judgment shall also be rendered against him for the costs of the prosecutor; and if the clerk be acquitted, he shall recover a judgment against the prosecutor for his costs.

§ 449 ⁽⁴¹⁵⁾ **Prosecutor—when not necessary.** If a clerk have been convicted by the judgment of a court of competent jurisdiction of an offense which, by the provisions of a statute of Kentucky, creates a

forfeiture of his office, upon a transcript of the record of such conviction being produced to the attorney-general he shall forthwith file an information, without any prosecutor being named therein, against such clerk, and file therewith the transcript of such record, and thereupon the same proceedings shall be had as upon informations with a prosecutor.

§ 450 (418) **Clerk pro tem. may be appointed.** If an information be filed against the clerk of the Court of Appeals, the court may appoint a person to act as clerk during the prosecution, in all matters connected with the prosecution.

APPENDIX.

- CHAPTER I. JURISDICTION OF COURTS, PAGE 547.
II. COURTS HAVING CONTINUOUS SESSIONS, PAGE 557.
III. COURTS HAVING FOUR JUDGES, PAGE 563.
IV. SPECIAL JUDGES, PAGE 569.
V. CHANGE OF VENUE, PAGE 571.
VI. REMOVAL OF ACTIONS AND PROSECUTIONS TO UNITED STATES COURTS, PAGE 580.
VII. RULES OF COURT OF APPEALS, PAGE 593.

CHAPTER I.

JURISDICTION OF COURTS.

- ARTICLE 1. COURTS OF APPEALS, PAGE 547.
2. CIRCUIT COURTS, PAGE 548.
3. QUARTERLY COURTS, PAGE 549.
4. COUNTY COURTS, PAGE 549.
5. FISCAL COURTS, PAGE 550.
6. JUSTICES' COURTS, PAGE 550.
7. POLICE COURTS, PAGE 551.

ARTICLE 1.

COURT OF APPEALS.

[§ 949, Ky. Stat.] **Power vested in the court and judges.** Power is vested in the Court of Appeals to administer oaths, punish contempts and make rules consistent with law for the government of its proceedings and to issue such writs as may be necessary to give it a general control of inferior jurisdictions; and to any judge thereof power is given to reinstate attachments and injunctions. (*Constitution, sec. 110*).

[§ 950, Ky. Stat.] **Jurisdiction in civil cases.** No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than one hundred dollars, exclusive of interest and costs, nor to reverse a judg-

Art. 1. Court of Appeals — jurisdiction secs. 334-340, and notes thereto, page
in civil cases, see sec. 734, and notes 513; in misdemeanor cases, see secs. 347,
thereto, page 361; in felony cases, see 348, and notes thereto, page 520.

ment granting a divorce, or punishing contempt; nor from any order or judgment of a county court, except in actions for the division of land and allotment of dower, nor from any order or judgment of a quarterly court, city court, police court, fiscal or justice's court, nor from a bond having the force of a judgment. In all other civil cases the Court of Appeals shall have appellate jurisdiction over the final orders and judgments of all courts.

Jurisdiction in criminal cases. See Criminal Code, page 513.

Special judges—See Constitution, sec. 117; Ky. Stat., sec. 952.

ARTICLE 2.

CIRCUIT COURTS.

[§ 966, Ky. Stat.] **Original jurisdiction.** The Circuit Court shall be a court of record and shall have original jurisdiction of all matters both in law and equity of which jurisdiction is not exclusively delegated to some other tribunal, and shall have jurisdiction in all cases where the title to land is in question, or in which it is sought to enforce a lien upon, or to subject land by provisional remedy to the payment of debts. (*Exclusive jurisdiction of justices' courts, see article 6, page 550; exclusive jurisdiction of police courts, see article 7, page 551.*)

[§ 978, Ky. Stat.] **Appellate jurisdiction.** Appeals may be taken to the circuit court from all orders and judgments of the fiscal court or quarterly court in civil cases where the value in controversy, exclusive of interest and costs, is over twenty-five dollars and from all

Art. 2. (1) Circuit courts appellate jurisdiction. In civil cases, see sec. 724, and notes, page 354; in criminal cases, see secs. 362, 363, page 524.

(2) **Original in civil cases;** amount in controversy. Several demands, amounting in the aggregate to more than fifty dollars, united in the same petition will give the circuit court jurisdiction, although each debt with its interest is below that sum. *Bakewell v. Howell*, 2 Met. 268. So if an obligation for the payment of installments of less than fifty dollars each, enough installments being due to exceed fifty dollars. *Brown v. Brown*, 10 B. M. 247. Where several are jointly suable on the same contract

for separate amounts, the aggregate claimed against all determines the jurisdiction. *Wilde v. Haycroft*, 2 Duv. 309.

(3) Circuit courts have jurisdiction to enforce liens and subject lands to the payment of demands less than fifty dollars. *Bush v. Williams*, 6 Bush 405; *Craig v. Garnett*, 9 Bush 97.

(4) State courts have jurisdiction of an action against a national bank under sec. 5198, Rev. Stat., U. S., to recover the penalty for taking usurious interest. *Henderson Nat. Bank v. Alves*, 91 Ky. 142.

(5) **Original in criminal cases.** See Criminal Code, secs. 13, 14, 18, 20 to 25.

judgments of the county court where the amount in controversy is over fifty dollars, exclusive of interest and costs, and from all judgments and orders of said court in cases of bastardy or in the settlement of the accounts of personal representatives, assignees, guardians, trustees, curators and other fiduciaries and from orders granting, revoking or refusing letters testamentary, or of administration, or appointing or refusing to appoint or removing curators, guardians, trustees or committees of estates or granting or refusing to grant druggist, tavern or liquor license and from judgments in proceedings to condemn land for any purpose, and in all other cases allowed by law.

Appellate jurisdiction in criminal cases. See Criminal Code, page 524.

ARTICLE 3.

QUARTERLY COURTS.

[§ 1051, Ky. Stat.] **Jurisdiction in civil cases.** The quarterly court in civil cases shall have jurisdiction, concurrent with justices' and city or police courts, of all actions within its county for the recovery of money or personal property where the value in controversy is one hundred dollars or under, exclusive of interest and costs, and concurrent jurisdiction with circuit courts of all such actions where the value in controversy is over fifty and not more than two hundred dollars, exclusive of interest and costs.

[§ 1053, Ky. Stat.] **Motions against constables and their sureties** for failure to pay over money collected.

[§ 1054, Ky. Stat.] **Appellate jurisdiction.** Appeals may be taken to the quarterly court from all judgments and orders of justices', fiscal, city or police courts when the value in controversy is over ten dollars, exclusive of interest and costs. (*Provisions of Code as to appeals, secs. 724 to 732.*)

ARTICLE 4.

COUNTY COURTS.

[§ 1057, Ky. Stat.] **Jurisdiction.** The county court shall have jurisdiction to probate wills, appoint and remove personal representatives,

Art. 4. (1) County courts are courts of limited jurisdiction and derive all their powers from some express statutory enactment. *Gilbert v. Bartlett*, 9 Bush 49; and are not exclusively judicial

tribunals, as many powers not judicial are vested in them. *Pennington v. Woolfolk*, 79 Ky. 13; see further, Ky. Stat., page 466.

guardians, trustees, committees, curators and other fiduciaries, to grant tavern, drug and liquor license and such other jurisdiction as may be conferred upon it by law.

ARTICLE 5.

FISCAL COURTS.

[§ 1840, Ky. Stat.] **Jurisdiction.** The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated, to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures and superintend the same, to regulate and control the fiscal affairs and property of the county, make provision for the maintenance of the poor and provide a poor house and farm and provide for the good condition of the highways in the county and to execute all of its orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court or court of levy and claims.

ARTICLE 6.

JUSTICES' COURTS.

[§ 1086, Ky. Stat.] **Civil jurisdiction.** Justices' courts shall have jurisdiction, concurrent with circuit and quarterly courts of this Commonwealth, of all actions and proceedings for the recovery of money or personal property in civil cases where the matter in controversy, exclusive of interest and costs, does not exceed one hundred dollars, and shall have jurisdiction, exclusive of circuit courts and concurrent with quarterly courts in civil cases, of all actions and proceedings for the recovery of money or personal property when the value in controversy, exclusive of interests and costs, is fifty dollars or under, and shall have jurisdiction, concurrent with quarterly courts, of motions against constables for failing to discharge their duty, and such other jurisdiction as may be provided by law.

(2) **Trial by county judge of misdemeanor cases** transferred from circuit court. Ky. Stat., sec. 1070: Criminal Code, sec. 15.

Trial by county judge of persons in jail charged with misdemeanor. See page 398.

[§ 1093, Ky. Stat.] **Criminal jurisdiction.** Justices' shall have jurisdiction, exclusive of circuit courts, in all penal cases the punishment of which is limited to a fine not exceeding twenty dollars; and jurisdiction, concurrent with circuit courts, of all penal cases the punishment of which is limited to a fine not exceeding one hundred dollars or imprisonment not exceeding fifty days, or both. (*See further, Criminal Code, secs. 13-18.*)

ARTICLE 7.

POLICE COURTS.

- SUBDIVISION 1. CITIES OF THE FIRST CLASS.
2. CITIES OF THE SECOND CLASS.
3. CITIES OF THE THIRD CLASS.
4. CITIES OF THE FOURTH CLASS.
5. CITIES OF THE FIFTH CLASS.
6. TOWNS OF THE SIXTH CLASS.

SUBDIVISION 1.

CITIES OF THE FIRST CLASS.

[§ 2912, Ky. Stat.] **Jurisdiction—examining court.** Said court shall have original and exclusive jurisdiction in all cases of violations of municipal ordinances and by-laws occurring within the corporate limits of the city, and such criminal jurisdiction within the said limits as justices of the peace have, with the necessary power to carry into effect the jurisdiction given; said court shall have exclusive jurisdiction, as an examining court, of all felonies and misdemeanors committed within the corporate limits of the city, and shall exercise all the powers and duties of examining courts. The stenographer of the court shall take down all the evidence given in examining trials; and, at the conclusion of the trial, the court shall commit or discharge the accused, or hold him to answer before the proper court, as may be adjudged. If bond be required of the accused to appear and answer, said court shall have power to order the bond to be taken in such sum as it may direct. The bond, together with the evidence, shall be transmitted by the clerk within twenty-four hours to the proper court. The bond shall be in writing, and it shall not be invalidated by any irregularity in its form, or in the manner of taking or giving the same. Persons arrested under a charge of

crime must be presented to the court for trial within twenty-four hours after arrest, unless Sunday intervene.

[§ 2913, Ky. Stat.] **Fines and penalties—imprisonment—hard labor—custody of children.** Said court shall have power to impose such fines and penalties as may be prescribed by the Statutes of the State, or by the ordinances of the city, but no imprisonment exceeding thirty days shall be ordered, and no fine exceeding fifty dollars shall be imposed without the intervention of a jury, unless the right to have a jury is waived by the party to be tried. Cases in which the right to the custody and care of children is involved shall be tried by the court. When imprisonment is prescribed by the judge or jury trying the case, it shall be in the discretion of the judge or jury to direct whether or not the imprisonment shall be with hard labor, unless the statute imposing the penalty distinctly presents the exercise of such discretion. (*See further as to powers of court, Ky. Stat., secs. 2914-2921; appeals from, see Ky. Stat., sec. 2922.*)

SUBDIVISION 2.

CITIES OF THE SECOND CLASS.

[§ 3147, Ky. Stat.] **Jurisdiction of police court.** Said court shall have exclusive original jurisdiction in all prosecutions for the violation of the ordinances of the city, and jurisdiction, concurrent with the circuit court and justices of the peace, of all pleas of the Commonwealth arising within the limits of the city, except cases of felony; and said court shall have power and authority to take recognizances from persons charged with offenses recognizable before said court, to appear and answer the same as the circuit courts have, and a like power to enforce compliance with the same, and as to committing criminal offenders and sending them on for trial, said court shall have all power given by the general law to examining courts.

[§ 3148, Ky. Stat.] **Petit larceny and vagrancy—jurisdiction.** Said court shall have jurisdiction of all cases of petit larceny and vagrancy arising in said cities, respectively, and the justices of the peace are hereby required to make the recognizances of all persons charged with being vagrants or with petit larceny within said several cities returnable to the police court instead of the circuit court, and upon conviction of vagrancy or petit larceny, the person so convicted shall be sent to labor in the city prison or work-house for not less than three nor more than twelve months; presentment or indictment by a grand jury shall

not be necessary in cases of vagrancy or petit larceny, but the person charged with either of these offenses may be arrested on warrant and tried by the police judge, and if found guilty, convicted by him; women may be so tried and convicted on the charge of being vagrants.

[§ 3149, Ky. Stat.] **Riots, routs and unlawful assemblies—jurisdiction—arrest of offenders.** The jurisdiction of the police judge shall extend to all cases of riots, routs or unlawful assemblies within the city. Whenever said judge shall be advised or receive information on oath of any rout or any unlawful assemblies of people, for the purpose of gaming or any other unlawful purpose whatever, it shall be lawful for him to issue his warrant to arrest all such offenders directed to the sheriff, or any constable of the county, or the police of the city, and if no officer be at hand to serve such warrant, then to such discreet persons as said judge shall appoint, returnable before some justice of the peace of the county, on which warrant it shall be the duty of the officer or other person to arrest and bring before said justices of the peace of the county all persons who shall be found so assembled, to be dealt with by the justices according to law; and it shall be the duty of the citizens of the city and county to attend the officer or other person, if they should be thereunto summoned, to aid and assist in arresting the persons so found guilty of infracting the law.

[§ 3159, Ky. Stat.] **Recognizances for appearance and to keep the peace.** Said court shall have power to take recognizances for the appearance in said court of persons charged with offenses recognizable in said court, also recognizances to keep the peace and be of good behavior for the period of one year.

[§ 3164, Ky. Stat.] **Territorial jurisdiction—Ohio and Licking rivers.** The territorial jurisdiction of the said court shall be co-extensive with the corporate limits of the said several cities; and said court, in cities bordering on the Ohio river, shall have jurisdiction over said river opposite to the city to low-water mark on the Ohio side, and cities on the Licking river over said Licking river to the opposite shore.

SUBDIVISION 3.

CITIES OF THE THIRD CLASS.

[§ 3359, Ky. Stat.] **Jurisdiction—exclusive—concurrent.** The police court shall have exclusive jurisdiction of all prosecutions for violations of the ordinances or by-laws of the city occurring within the corporate limits of the city, and the offender may be summoned or

arrested in the city or elsewhere. It shall also have the concurrent jurisdiction with the justices of the peace of all violations of the laws of the Commonwealth occurring within the corporate limits of the city, and the offender may be summoned or arrested in the city or elsewhere. It shall also have jurisdiction to try and adjudge forfeitures on all bails and recognizances entered into or deposited in prosecutions pending in said court. All prosecutions for violations of the ordinances or by-laws of the city occurring outside of the corporate limits of the city may be prosecuted in the name of the city, and for its benefit, in the police court or in any court of competent jurisdiction. (*Appeals from, see Ky. Stat., sec. 3367.*)

[§ 3362, Ky. Stat.] **Examining court—fees.** The police court may act as an examining court, as justices of the peace or judge of the county court are or may be authorized to act, and when so acting the presiding judge of same shall be allowed the same fees, fees to be paid in the same way, and they shall be in addition to the salary paid him by the city.

SUBDIVISION 4.

CITIES OF THE FOURTH CLASS.

[§ 3513, Ky. Stat.] **Examining court—general powers—jurisdiction—jury fee.** The judge of the city court shall be commissioned by the governor; he shall be a conservator of the public peace and may order arrests for all offenses against the laws of the State or ordinances of the city; and for those committed within his presence he may order arrests without warrant. He shall have full power and authority to require bail, and receive the acknowledgment and execution of recognizances of bail in all cases coming before him in which bail is or may be authorized hereafter, or required by the laws of the land, and to take recognizances or bail for good behavior and to keep the peace, the same as circuit courts have, and like power to take the same as forfeited and pronounce judgment thereon and to enforce full compliance therewith. Said court shall have the power as an examining court in all cases except homicide, and shall have original concurrent jurisdiction within the limits of the city of all offenses within the jurisdiction of justices of the peace. The city court shall have civil jurisdiction co-extensive with the county, and equal to that of justices of the peace. Said court shall have jurisdiction over affrays, riots and routs, breaches of the peace, unlawful assemblies, and cases

of indecent or immoral behavior or conduct calculated to disturb the peace and dignity of said town; over all cases of drunkenness, running horses, profane swearing, firing guns or pistols, carrying concealed deadly weapons, making reports by burning powder or crackers or otherwise, blowing horns, flying kites, crying aloud by day or night, and all other riotous conduct whatsoever within said town, all of which are hereby declared to be misdemeanors, for which fines or imprisonment, or both, may be prescribed by ordinance. He shall have exclusive jurisdiction of all offenses or causes arising out of ordinances enacted by the council for the enforcement of the powers granted them by law. He shall have power to issue summons for witnesses in cases pending before him, and upon their failure to attend may award compulsory process to compel their attendance. He shall have power, without the intervention of a jury, to fine and imprison for contempt, provided the fine shall not exceed ten dollars nor the imprisonment twelve hours. He shall have power and authority to administer oaths, take depositions and grant injunctions, issue attachments and distress warrants, writs of *habeas corpus*, in the same manner and under the same restrictions and in the same causes that county judges are now or may hereafter be authorized by law. In all trials under the ordinances of the city, when no jury is required, the court shall tax one dollar as the judge's costs therein. In jury trials under the ordinances of the city the court shall tax two dollars as the judge's costs therein. (*Appeals from, see Ky. Stat., secs. 3519, 3520.*)

SUBDIVISION 5.

CITIES OF THE FIFTH CLASS.

[§ 3651, Ky. Stat.] **Jurisdiction — terms — practice — appeals.** A police court is hereby established in such city to be held by the police judge of such city. Said police court shall have jurisdiction, concurrent with the justice's courts, of all actions and proceedings, civil and criminal, except that in criminal cases the jurisdiction shall be confined to cases occurring within the city, and shall always be open for trial of criminal and penal causes, and shall hold monthly terms of said court for the trial of civil cases, the terms to be fixed by the city council, and shall have exclusive jurisdiction of all actions for the recovery of any fine, penalty or forfeiture prescribed for the breach of any ordinance of such city, of all actions founded upon any obligations or liability created by any ordinance, and of all pros-

ecutions for any violations of any ordinance. The rules of practice and mode of proceedings in such police court shall be the same as are, or may be, prescribed by law for justices' courts, and appeals may be taken from all judgments of said police courts, in the time and manner, and where the amount in controversy authorizes appeals from justices' courts.

SUBDIVISION 6.

TOWNS OF THE SIXTH CLASS.

[§ 3710, Ky. Stat.] **Jurisdiction — terms — practice—appeals.** A police court is hereby established in such towns, to be held by the police judge of such towns. Said police court shall have jurisdiction, concurrent with the justices' courts, of all criminal cases and proceedings, but such jurisdiction shall be confined to cases occurring within the city, and said courts shall always be open for the trial of penal and criminal causes; and said police courts in cities and towns of the sixth class, having a population of two hundred and fifty or more, shall have jurisdiction, concurrent with justices' courts, in civil actions and proceedings; and a court shall be held twelve times each year, at intervals of one month, for the trial of civil cases, the terms to be fixed by the board of trustees. Said court shall have exclusive jurisdiction of all actions for the recovery of any fine, penalty or forfeiture prescribed for the breach of any ordinance of such town and of all prosecutions for any violation of any ordinance. The rules of practice and mode of proceeding in said court shall be the same as are prescribed by law for justices' courts, and appeals may be taken from all judgments of said police courts, in the time and manner and where the amount in controversy authorizes appeals in cases from justices' courts.

CHAPTER II.

COURTS HAVING CONTINUOUS SESSION.

[KENTUCKY STATUTES, PAGE 455.]

[Sections 980 to 983, inclusive, relate exclusively to courts in counties having a population of less than 150,000.]

§ 980. Counties constituting separate districts—places of holding courts—jurisdiction—juries—publications in official newspaper—rules of court—judicial notice. That in counties having a population of less than one hundred and fifty thousand, and which constitute separate judicial districts, the circuit courts shall be in continuous session, and shall be held in cities of the second class, where there are or may be such cities, but the judge of such courts shall hold part of such sessions at the county seat of the county where the same is not such city, such part to be not less than two weeks if the business of the court require so long, in February, June and October of each year. And all suits in which the defendants, or the greater number of defendants, reside nearer to said county seat than to said city of the second class, shall be docketed and tried at said county seat, and the process in such cases shall so indicate. Foreign corporations, non-residents of the county, and common carriers whose lines extend into any part of said city or county, shall be deemed residents of the places, and the plaintiff in any action against any such defendant may select at which place he will have the case docketed and tried, and the process shall be made by the clerk to so indicate. By consent, parties may have their case tried at either place. And when in any such county there is a city of the second class, which city has an official newspaper, then all advertisements, notices, steps and proceedings in causes in such court of which publication is required by law, or by rule of such court, or of which publication is ordered or directed by the court or judge thereof to be made, shall be published in such official newspaper, but at not greater than the regular advertising rates. That in counties where circuit courts hold sessions in more than one place in the county, juries shall be selected and drawn at each place as now required by law to be selected and drawn for the county. That the circuit courts may, from time to time, cause such rules as they may adopt to be certified to the Court of Appeals, and when this is done, the Court of Appeals shall take judicial notice thereof, and the same need not be copied into any transcript.

§ 981. **Grand juries—not less than four—places of meeting.** Judges of said court shall cause not less than four grand juries to be summoned and impaneled each year, one of which shall meet at the county seat—not a city of the second class—and he may cause as many more to be summoned and impaneled as he may deem proper.

§ 982. **Assignment of cases for trial—rules of court.** The judges of said court shall have power to assign for trial all cases, whether ordinary, equitable or criminal, for such days as, in his discretion, will best conduce to the convenient dispatch of business; and may, from time to time, prescribe and change rules of court regulating the conduct of business therein.

§ 983. **Provision for return of process.** In all actions commenced in any of such counties in courts having jurisdiction similar to circuit courts, between the date of the passage of this act and the first Monday in January, in one thousand eight hundred and ninety-three, all process shall be returned to the circuit court of such county, and within twenty days from said first Monday in January, one thousand eight hundred and ninety-three.

§ 984. **Practice prescribed.** That the practice in circuit courts having continuous session shall be as hereafter prescribed.

§ 985. **Juries—manner of selecting and summoning.** Juries shall be selected and summoned in the same manner as is provided for circuit courts not having continuous session, except that the selection may be made on the first judicial day of the court in each month.

§ 986. **Bail bonds—summons.** Bail bonds shall provide for the appearance of the accused on a day certain; and summons in criminal cases shall require the appearance on the first Monday of same month named therein.

§ 987. **Criminal and penal cases—terms—days for motions and trials.** In all criminal or penal cases in which an act is required to be done or motion made, or case set for trial at a given term by the law applicable to courts having terms, said act shall be done, or motion made, or case set for trial, on a day of a corresponding calendar month, as if each month, beginning with the first Monday of a calendar month, were a term.

§ 988. **Control of judgments for sixty days.** The court shall have control over its judgments for sixty days, as circuit courts have over their judgments during the term in which they are rendered.

§ 988. **Power over judgment for sixty days.** This section is the same as sec. 772, of Civil Code, omitted from this revision. See, construing that section of Code, L.

& R. & L. Co. v. Kerr, 78 Ky. 12; Johnson v. Johnson, 88 Ky. 275; Johnson v. Stivers, 95 Ky. 128.

§ 989. **Taxes on real property—summary proceedings.** The court may, in actions for sale of real property, determine summarily, with or without written pleadings, the amount of any State, district or municipal taxes or assessment upon the property to be sold, and shall provide for the payment of the same in the judgment; and if the plaintiff fail to ask therefor, the purchaser shall be entitled, at any time before payment of the purchase price, to a credit for the amount thereof.

§ 990. **Rule docket to be kept by clerk.** The clerk shall keep rule dockets, in which he shall enter the names of the parties in each case, the issuing and return of process, and a memorandum showing the substance of each order of court or step taken in the clerk's office, and shall receive five cents for each order or step so entered, to be taxed as costs.

§ 991. **Equity and common law docket.** He shall also keep equity and common law trial dockets.

§ 992. **Record of fiducial settlements—fees.** The clerk shall record, in proper books, the statements of all settled accounts of fiduciaries made in such court, and shall be entitled to the same fees as clerks of county courts for similar services, to be paid by the fiduciary and charged to the trust estates.

§ 993. **Equity trial docket—cases against cities.** On the equity trial docket shall be entered the actions that are ready for trial. Said docket shall be called at such times as the court may deem proper, when the actions thereon shall be heard, or the trial be postponed to a future day, or the action be remanded. No case in which any city is a party shall be submitted on motion or trial, unless the name of the said city shall appear in the style of case on the docket in which said case is set for motion or trial.

§ 994. **Motions placed on equity docket.** Any motion made and assigned to a future day for hearing may be placed upon such docket.

§ 995. **Pleadings admitted true—action docketed.** When a party consents that the pleadings of the opposite side may be taken as true, the action may be at once placed on such trial docket.

§ 996. **Failure to plead—action docketed.** Any party may place the action on such trial docket, when the time allowed to the opposite party to plead has expired, without such pleading being filed: *Pro-*

§ 989. **Taxes—payment out of proceeds of sale.** In *Gay v. City of Lou.*, 93 Ky. 349, it is held that under sec. 773, of Civil Code (omitted from this revision), and which was same as this section, that

the chancellor had no power to make provision for the payment of taxes due by a decedent unless the tax bill was verified, as other claims against decedents' estates are required to be.

vided, That if any issue shall have been formed thirty days shall have expired since it was formed.

§ 997. **New trial in equity—when application to be made.** Any application for a new trial in an equitable action or proceeding, except for newly discovered evidence, shall be made within fifteen days after the judgment is rendered; and if the application be for cause mentioned, it shall be made as provided by general laws as to courts having terms, sixty days being counted as a term.

§ 998. **Vacation or modification of judgment.** Proceedings to vacate or modify a final order for grounds for which, in courts having terms, it might be vacated after the term at which it was rendered, may be had in reference to any order or judgment of the court, after expiration of sixty days from its rendition. A motion to vacate a judgment, because of its rendition before the action could regularly be placed upon the trial docket, shall only be entered within three months after its rendition.

§ 999. **Revivor of actions—cause shown against.** Within thirty days after the service of an order to revive an action, the party upon whom it is made may show cause against the revivor; and if sufficient cause be not shown within that time, the action shall stand revived.

§ 1000. **Revivor—warning order to allow sixty days.** An order warning parties to appear and show cause why an action should not be revived shall allow sixty days for their appearance; and if within the said period sufficient cause be not shown to the contrary, the action shall stand revived.

§ 1001. **Amended petition before answer.** The plaintiff may, without leave, amend his petition at any time before answer is filed.

§ 1002. **Judicial sales—deposit required.** The court may by rules require purchasers at judicial sales to deposit with the officers making the sale, at the time of sale, a specified sum of money, sufficient to cover the expense of a re-sale; and if such deposit be not made at the time, the officer shall at once re-sell the property.

§ 1003. **Defendant allowed twenty days to answer.** The time fixed in the summons for the defendant to answer shall be twenty days after the service thereof, if in the county where such courts sit, and thirty days if elsewhere in the State.

§ 1004. **When defendant to answer—warning order—constructive service.** The defense to an action shall be filed within twenty days after the service of the summons in the county where such court sits, or within

§ 1004. **Constructive service.** See Irish B. & L. Assn. v. Clemons, 78 Ky. 79, construing sec. 809, Civil Code (omitted

from this revision), substantially like this section.

thirty days after such service elsewhere in the State. Every warning order shall warn the defendant to appear and defend the action within sixty days after the making of the warning order, and the defendant shall be considered as constructively summoned in thirty days after the making of such warning order.

§ 1005. **Pleadings, subsequent to answer—filing.** Every pleading subsequent to the answer shall be filed in fourteen days after the pleading is filed to which it responds, but the court may extend the time for pleading.

§ 1006. **Interrogatories—when to be answered.** Interrogatories annexed to a pleading shall be answered when the responsive pleading is required to be filed.

§ 1007. **Filing pleading with clerk—effect of.** The filing of a pleading in the clerk's office within the proper time, and causing it to be noted upon the clerk's memorandum book and rule docket, shall be equivalent to a filing in court.

§ 1008. **Depositions to be taken on interrogatories.** All depositions in equitable actions shall be taken upon interrogatories, unless the court shall otherwise provide by rule, or by an order in the cause.

§ 1009. **Depositions—how certified—rules—notice.** Depositions shall be taken and certified in the manner and by the officers directed in this Code, subject to the following modifications: Depositions in cases in the county where such court sits may be taken before the commissioner of the court, and no commission shall be required therefor. Notice to the adverse party shall not be necessary; but the court shall, by rule, prescribe days for the filing of interrogatories, and the time they shall remain in the clerk's office. If a deposition be taken upon interrogatories, neither party nor his agent or attorney shall be present at the examination of the witness, unless he have notified the adverse party of his intention to be present; and in such case, the party in whose behalf the deposition is to be taken shall notify the adverse party of the time and place of the taking. When it appears by the certificate of the officer that one only of the parties was present at the examination of the witness, the reason for permitting him to be present shall be stated; and when a notice to attend has been given, the evidence thereof shall be annexed to the certificate. Depositions to be read in the court may be taken by the commissioner. The court may prescribe, by rule, that depositions taken on oral examination shall be taken in narrative form, subject to such regulations as may be prescribed in the rule.

§ 1010. Sales of property—terms of. Sales of property shall be for cash, or on reasonable credit, or for part cash and part on reasonable credit, as the court may direct; but a sale of personal property shall not be on a longer credit than four months.

§ 1011. Advertisement of sales. The court may direct sales made under its orders to be advertised in one or more newspapers published in or out of this State; but no such advertisement shall be ordered if all the parties interested be actually before the court and capable of giving consent, and none of them asks therefor.

§ 1012. Sale bonds—interest—to whom payable and collection of. The bonds of the purchasers of property sold by order of the court shall bear interest from the day of sale at the same rate the judgment bears, and shall be made payable to the clerk of such court, and shall be signed or acknowledged before and attested by the officer who made the sale. Proceedings on such bond may be had in the name of the clerk of such court, without using the name of the clerk for the time being, at the instance, as the relator of any person interested, he being responsible for the costs. But in courts in counties having a population of less than one hundred and fifty thousand, and constituting separate judicial districts, such bonds shall be made payable to the commissioner making the sale; and in such cases, the proceedings above authorized in the name of the clerk may be had in the name of such commissioner. Performance of such bond may be summarily enforced by orders of court, and by proceedings as for contempt, if they be not obeyed. The bonds shall have the force of judgments, and upon executions thereon no replevin shall be allowed, and sales shall be for cash.

§ 1013. Bail in civil cases—objection for insufficiency—liability of receiver. An objection to bail in civil cases for insufficiency shall only be made by motion within ten days after the return of the bail bond. A liability incurred by any person or corporation as receiver or depository of money or property committed to his or its charge by order of the court shall rank with debts due to the Commonwealth, and shall have priority over other debts owing by such receiver or depository, and precedence over any mortgage or lien upon the property of such receiver or depository made after his or its appointment.

§ 1014. Appeal granted within sixty days. An appeal from a judgment may be granted by the court within sixty days from its rendition.

§ 1010. Sales of property—terms of sale.
See Willett v. Johnson, construing sec. 827 of Code (omitted from this revision), same as this section, and holding that it

was error to require a cash payment of two thousand dollars where amount to be raised was about twenty thousand dollars.

§ 1015. **When ordinary actions placed on trial docket.** In civil actions or special proceedings other than equitable, after an issue of law or fact is formed, or after the time for pleading has elapsed without a pleading being filed, either party may place the action or proceeding on the common law trial docket of the court or the branch thereof in which same is pending, which shall be kept and called as the court shall, by rule, direct.

§ 1016. **Bills of exceptions—when prepared and signed.** Bills of exceptions must be prepared and presented to the judge within sixty days after the making of the order excepted to; but exceptions taken during the trial need not be noted of record nor reduced to writing, unless by order of the court, until after the trial; within sixty days after the judgment becomes final, the party excepting shall, unless further time be given him, prepare his bill of exceptions, but further time may be given to prepare a bill, but not beyond one hundred and twenty days after the judgment becomes final.

§ 1017. **Practice to conform to that of courts having terms.** Except as hereinbefore provided, practice in circuit courts having continuous session shall conform as nearly as practicable to practice in circuit courts having terms.

CHAPTER III.

COURTS HAVING FOUR JUDGES.

[KENTUCKY STATUTES, PAGE 460.]

§ 1020. **Election of judges—tie vote.** That in every district entitled to four circuit judges, each office of circuit judge shall be voted for separately. The ballots shall specify as follows: "For judge of the circuit court, criminal division; for judge of the circuit court, chancery division; for judge of the circuit court, common pleas division; for judge of the circuit court, law and equity division." The person receiving the largest number of legal votes marked criminal division shall be elected; and, in like manner, the persons receiving, respectively, the largest number of legal votes marked chancery division, common pleas division, and law and equity division, shall be elected. In case of a tie in any of said elections, the result shall be decided as in case of a tie vote between two or more candidates for a single office.

§ 1021. **Vacancies in office—filling.** This act shall also apply to the filling of vacancies in the office of circuit judge in such district.

§ 1022. **Commission of judges.** Each of said judges shall be commissioned as a circuit judge for the district for which he is elected, and shall have all the powers of a circuit judge.

§ 1023. **Criminal, chancery, common pleas and law and equity branches.** Every circuit court in the Commonwealth having four judges shall have four branches, to be named, respectively, criminal, chancery, common pleas and law and equity branch.

§ 1024. **Continuous session in each court.** Every such court shall have continuous session.

§ 1025. **Jurisdiction how divided—assignment of causes—duty of clerk.** Of cases within the jurisdiction of such court, all criminal prosecutions and proceedings on bail bonds and recognizance in criminal cases shall be brought and prosecuted in the criminal branch; litigation prosecuted in the other branches shall be divided between them, according to rules of court, to be made in general term. Until such rules are made, whenever eighteen equitable actions or special proceedings of such litigation are unassigned, the clerk shall, in the presence of one of the four judges, write the style or number of each of said causes upon a separate card or slip, and place the said eighteen cards or slips in a box or receptacle therefor prepared, and draw them indiscriminately therefrom, one at a time, and assign them to said branches, giving the chancery branch the first twelve drawn, to the common pleas branch the next three drawn, and to the law and equity branch the remaining three; and whenever eighteen actions or special proceedings, not equitable, are unassigned, said clerk shall, in like manner, draw, in the presence of one of the four judges, and assign them to the last two named branches, giving to the common pleas branch the first nine drawn, and to the law and equity branch the last nine. Until said causes or proceedings are so assigned any orders required therein may be made therein by any one of said four judges. None but equitable actions and special proceedings shall be assigned to the chancery branch. No rule of court shall assign more law or equity causes to one or the other of the two branches, common pleas and law and equity.

§ 1026. **Assignment of judges—vacancies.** Each judge of said court shall be assigned to preside over one branch of said court during his entire term of office, except as hereinafter provided. Said assignment shall be made as follows: The judge elected by ballots marked criminal division shall, during his entire term, preside over the criminal branch; the judge elected by ballots marked chancery division shall, during his entire term, preside over the chancery branch; the judge

elected by ballots marked common pleas division shall, during his entire term, preside over the common pleas branch; and the judge elected by ballots marked law and equity division shall, during his entire term, preside over the law and equity branch. When a vacancy is filled, the judge appointed or elected to fill same shall preside over the branch presided over by the judge whose place became vacant; and if more than one vacancy is filled at any election, the judges filling them shall preside over the branches respectively designated by the ballots electing them.

§ 1027. Transfer from court or docket—except criminal cases—special judge. Rules of general term shall provide for transfer of causes or issues from one branch to another, or from one docket of a branch to another docket of the same branch, where, by reason of the nature of the cause or issue, or the disability of the judge, such transfer may be proper. But no transfer shall be made of criminal causes, and in such causes, and in causes which have been once transferred, if the presiding judge can not sit, a special judge shall be chosen by the attorneys of the court in attendance, not interested nor of counsel, to preside; and such special judge shall have the same qualifications and powers as a circuit judge.

§ 1028. Proceeding not invalidated because in wrong branch. No proceedings in such court shall be invalid because prosecuted in the wrong branch thereof.

§ 1029. Judge failing to preside—judge of another branch to preside—special judge. When, for any cause, the judge presiding over any branch of such court fails to attend, the judge presiding over any other branch may attend and hold said court for the occasion; if no judge presiding over any branch of such court attends, the attorneys of said court in attendance thereon shall elect one of their number, having the qualifications of a circuit judge, to hold court for the occasion. Such special judge shall have the powers of a circuit judge.

§ 1030. Judge of one branch may preside over another branch. Any judge presiding over one branch of said court may, upon the request of a judge presiding over another branch of said court, hear and determine

§ 1029. Election of special judge. Under the various acts relating to the transfer of suits between the courts of Jefferson county, it was only when the judge failed to attend that the bar could elect a special judge. If the regular judge attended and could not properly preside in any particular case, it was his duty to transfer the case; or, if he failed to do

so, it became the duty of the clerk to make the transfer and to enter it upon the order-book. *Royal Ins. Co. v. Rufer*, 89 Ky. 518.

§ 1030. Jurisdiction. While a civil action can not be instituted in or transferred to the criminal branch of the Jefferson Circuit Court the judge thereof may be empowered by statute, as has

any case or question in such other branch pending; the request shall be entered on the order-book of the branch in which such case or question is pending.

§ 1031. **Grand jury summoned for criminal branch.** There shall be summoned by the sheriff of the county twelve grand jurymen, to attend on the first Monday of the next month, excepting the month of September, when they shall attend on the third Monday thereafter (excepting July and August) the criminal branch of such court. If such court shall deem it necessary, a grand jury composed of bystanders may be impaneled in any month after the discharge of the grand jury first impaneled.

§ 1032. **Bail bond—appearance of accused.** Bail bonds shall provide for the appearance of the accused on a day certain; and summons in criminal cases shall require the appearance on the first Monday of some month named therein.

§ 1033. **Acts required and motions—what regarded as a term.** In all criminal or penal cases in which an act is required to be done, or motion made, or case set for trial, at a given term, by the law applicable to courts having terms, such act shall be done or motion made or case set for trial on a day of a corresponding month, as if each month, beginning with the first Monday of a calendar month and ending with the Saturday before the first Monday of the next calendar month, were a term.

§ 1034. **Rules to be made in general term.** The said court shall, in general term, make rules of said court and shall have power, from time to time, to change such rules. Such rules shall be binding on each branch of said court until changed in general term.

§ 1035. **Control over judgments for sixty days.** Such courts shall have such control over its judgments for sixty days as circuit courts having terms have over their judgments during the term in which they are rendered.

§ 1036. **Actions for sale of real property—taxes—summary proceedings.** Such court may, in actions for sale of real property, determine summarily,

been done, to hear and determine according to prescribed rules a case pending in any other branch when the ends of justice require it. *Mengel v. Jackson*, 94 Ky. 472.

§ 1035. **Power over judgment for sixty days.** See, construing sec. 772 of Civil Code (omitted from this revision), same as this section, *L. & R. & L. Co. v. Kerr*, 78 Ky. 12; *Johnson v. Johnson*, 88 Ky. 275; *Johnson v. Stivers*, 95 Ky. 128.

§ 1036. **Taxes—payment out of proceeds of sale.** In *Guy v. City of Lou.*, 93 Ky. 349, it was held that under sec. 773 of Civil Code (omitted from this revision), same as this section, that the chancellor had no power to make provision for the payment of taxes due by a decedent, unless the tax bill was verified as other claims against decedent's estates are required to be.

with or without written pleadings, the amount of any State or municipal tax or assessment upon the property to be sold, and shall provide for the payment of the same in the judgment; and if the plaintiff fail to ask therefor, the purchaser shall be entitled at any time before payment of the purchase price to a credit for the amount thereof.

§ 1037. Commissioner to be appointed by the four judges. The four judges, any three concurring, shall appoint a commissioner, who shall hold his office during four years, unless removed, as he may be, at the pleasure of the court. He shall discharge the duties and have the powers appertaining to the office of a master in chancery, and as provided by law and the rules of the court.

§ 1038. Commissioner to take oath and give bond. Before entering upon the discharge of his duties, the commissioner shall appear in open court, execute bond according to law, and take an oath that he will honestly, impartially and to the best of his judgment discharge all the duties of his office, without favor of respect or persons, and render true and just reports of all his actings and doings as such.

§ 1039. Action on official bond of officers of the court. An action on the official bond of the clerk, marshal, receiver or depository of the court may be brought in said court as other actions of which it has jurisdiction.

§ 1040. Action on bond by person interested. Any person interested may sue on any of the bonds mentioned in the preceding sections of this act for a breach thereof; and any branch of the court may, by rule and attachment against the obligors therein, enforce their performance.

§ 1041. Times for holding general term. A general term of said court shall be held on the first Monday in January and July in every year, and also at such other times as the court shall, by rule, appoint; and all appointments of commissioner and receiver shall be made in general term by order entered on the order-book of the said court.

§ 1042. Order-book of general term. Besides the order-books and the judgment-books of the several branches of said court, the clerk of said court shall keep an order-book of the general term, wherein shall be entered all rules made and other business transacted at general terms.

§ 1043. Transfer of pending litigation—how distributed. The litigation pending in any such district in courts of like jurisdiction with circuit courts shall be transferred to the circuit court of such district and distributed among the branches thereof, as follows: All criminal prosecutions and proceedings on forfeited bail bonds and recognizances in criminal cases shall be transferred to the criminal branch

of said court. All actions and special proceedings pending in a court having general equity and not common law jurisdiction shall be transferred to the chancery branch. All actions and special proceedings pending in a court having general law and not equity jurisdiction to the common pleas branch, and all actions and special proceedings pending in a court having both law and equity jurisdiction to the law and equity branch.

§ 1044. **Transfer of cases involving a common fund.** Transfers may be made between said branches in all cases in which a common fund is involved in litigation either by way of attachment or otherwise, so that the distribution of the fund may be under the control of one branch of the court.

§ 1045. **Official interpreter for criminal division—appointment of.** The judge of the circuit court presiding in the criminal division of the circuit court of each judicial district of this Commonwealth, composed of a county containing a population of seventy-five thousand or over, may, in his discretion, appoint an official interpreter, who shall be appointed for a term of four years, and until his successor is appointed and qualified.

§ 1046. **Qualifications of interpreter.** No person shall be eligible to the position of official interpreter who is not able to speak fluently the English and German languages, and to interpret the one of these languages into the other.

§ 1047. **Interpreter to be present at all sessions of court.** It shall be the duty of said interpreter to be present at all sessions of the criminal division of said circuit court, and to interpret the evidence or statements of parties or witnesses in said court when directed so to do by the judge thereof.

§ 1048. **Oath administered to interpreter.** Before entering upon his duties as such interpreter he shall be required to take the oath required of all officers of this Commonwealth, and shall further swear that he will, to the best of his ability, true interpretation make in all matters and controversies in said court wherein he is directed to interpret.

§ 1049. **Salary of interpreter to be fixed by judge.** The said interpreter shall receive an annual salary, to be fixed by the presiding judge of said criminal division of such circuit court, not to exceed the sum of six hundred dollars, to be paid in monthly installments out of the county treasury.

CHAPTER IV.

SPECIAL JUDGES OF CIRCUIT COURT.

[§ 968, Ky. Stat.] **Disqualification of judge—special judge.** When from any cause the judge of the circuit court fails to attend or being in attendance can not properly preside in an action, proceeding or prosecution pending in said court, or if either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the parties by agreement may select one of the attorneys of the court to preside on the trial or hear the application, or hold the court for the occasion, and on their failure to agree upon an attorney, the attorneys of the court who are present and not interested nor employed in the cause shall elect an attorney of the court then in attendance having the qualifications of a circuit judge to hold the court for the occasion, who shall preside accordingly; and the judge so selected shall preside in all cases called during the term in the absence of the regular judge, or in which he can not preside, except in those cases in which the special judge can not properly preside. The election shall be held by the clerk, and in case of a tie he shall give the casting vote. The person elected shall, during the period that he acts, have all the powers and be subject to all the responsibilities of a circuit judge.

§ 968. (1) **Affidavit—sufficiency of.** To entitle a litigant to have the regular judge retire he must state in his affidavit the facts upon which he founds his belief that the judge will not give him a fair trial, and the facts thus stated must be such as should prevent the judge from presiding. The trial judge determines the sufficiency of the affidavit, and his decision is subject to revision on appeal. *German Ins. Co. v. Landram*, 88 Ky. 433. When the facts are stated in the affidavit they can not be put in issue or called in question by the judge. *Vance v. Field*, 89 Ky. 178.

(2) **Consent of parties not necessary.** A cause may be legally tried by a special judge elected by the members of the bar, one of the parties not consenting thereto. *Smith v. Blakeman*, 8 Bush 476; and see further, as to presumption that parties

consented to trial by special judge, *Rudd v. Woolfolk*, 4 Bush 555.

(3) **Governor—appointment of special judge by.** See *Kennedy v. Com.*, 78 Ky. 447.

(4) **Judge should retire when proper affidavit is filed;** if he does not the judgment of conviction in a criminal case will be reversed, although the record may not disclose any error committed by the court to the prejudice of the defendant. *Massie v. Com.*, 93 Ky. 588.

(5) **Objection—when to be made.** The objection to trial judge to be available must be made before an appearance to the merits of the action or the submission of preliminary motions by either party preparatory to a trial. *German Ins. Co. v. Landram*, 88 Ky. 433; *K. C. R. R. v. Kenney*, 82 Ky. 154; but a party may, after issues are made up, file an affidavit to require the judge to vacate

[§ 969, Ky. Stat.] **Special judge—pay of.** He shall be paid for his services eight dollars per day; but a special judge shall not be paid for any services as such unless he is engaged at least one day, nor unless the period of his service shall be certified by an order made by the regular judge, from his own knowledge or proof heard in open court.

[§ 970, Ky. Stat.] **Special judge—failure to act—second election—agreement.** If the person first elected to act as special judge fails or refuses to act or can not properly preside, another election shall be held in like manner from time to time until a suitable person is chosen who can and will preside. The parties to an action may agree upon a person to preside and he shall have the same power and be paid in the same manner as if elected by the attorneys of the court.

[§ 971, Ky. Stat.] **Special judge—appointment by governor—pay and mileage.** In the absence of the regular judge or when he can not preside, if the parties can not agree upon an attorney to act as judge who is present, or the bar fail or refuse to elect, the clerk shall at once notify the governor, who shall appoint as circuit judge an attorney having the qualifications of a circuit judge, to hold the court or try the case, and the judge so appointed shall have all the powers of the regular judge and receive the same compensation as a special judge and ten cents per mile in going to and returning from the court; and he may, if necessary, hold a special term to try any case after such notice or order as required when a special term is held.

[§ 972, Ky. Stat.] **Oath prescribed.** Every judge of a court and every special, before entering on the discharge of his duties, must, in addition to the oath prescribed by the Constitution, take an oath as

the bench, provided it is based upon facts discovered since issue was made. *Vance v. Field*, 80 Ky. 178; see *Russell v. Russell*, 11 R. 547.

(6) **Objection to special judge** must be made in the circuit court, otherwise it will not be available in the Court of Appeals. *Vandever v. Vandever*, 3 Met. 137.

(7) **Presumption in favor of qualifications.** Where a *pro tempore* judge has been elected as provided by law the presumption will be indulged that he possessed all the qualifications required to enable him to hold the office. *Cotton v. Wolfe*, 14 Bush 238.

(8) **Signing bill of exceptions.** Where

a special judge who tried case extended time to file bill of exceptions to next term, the party may at that term tender his bill in court and let it lie over until next term for special judge to sign if he is absent at term when bill is tendered. *McFarland v. Burton*, 89 Ky. 294.

(9) **Special judge acting without being sworn.** If the special judge whom the parties selected acted without being sworn the objection was waived by the acquiescence of the parties at the time. *Salter v. Salter*, 6 Bush 624.

(10) Special judge elected at one term of the court has no authority to try cases at the succeeding term. *Childers v. Little*, 16 R. 521.

follows: "I, A B, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge all the duties incumbent upon me as judge according to the best of my abilities." (*Constituted oath, Constitution, sec. 228.*)

[§ 973, Ky. Stat.] **Commission—selection of special judge—record of.** The commission of judges, the selection of special judges, the reason of such selection and the fact that the requisite oaths have been taken must be entered on the order book of the court.

Special judges of Court of Appeals. See Constitution, sec. 117; Ky. Stat., sec. 952.

CHAPTER V.

CHANGE OF VENUE.

[KENTUCKY STATUTES, PAGE 475.]

- ARTICLE 1. IN CIRCUIT COURTS, PAGE 571.
2. IN INFERIOR COURTS, PAGE 573.
3. IN CRIMINAL CASES, PAGE 575.

ARTICLE 1.

IN CIRCUIT COURTS.

§ 1094. **Consent—undue influence—odium.** The parties to any suit may, by consent, have an order in or out of court for its removal to any other court; or a party to any civil proceeding, triable by a jury in a circuit court, may have a change of venue when it appears that, owing to the undue influence of his adversary in the county, or to the odium which attends himself, or his cause of action or defense, he can not have a fair trial.

§ 1094. (1) **Affidavit—sufficiency of.** In an application for change of venue, where the affidavit of the litigant and his witnesses show a belief on his part that a fair trial can not be obtained, it is sufficient. *Newcomb-Buchanan Co. v. Bassett*, 1 Bush 658.

(2) **Agreement of parties** to transfer consolidated causes to the circuit court of a county in another judicial district was sufficient to authorize the change of venue to that court, although not the forum to which the causes should

have been removed if no agreement had been made. *Salter v. Salter*, 6 Bush 624.

(3) **All plaintiffs or all defendants must join** in the motion for change of venue in a civil case. *Whitaker v. Reynolds*, 14 Bush 616.

(4) **Objection to change of venue** is waived by a subsequent appearance in, and failure to object to, the jurisdiction of the court to which the transfer was made. *Vinsen v. Lockard*, 7 Bush 458; *Deering v. Halbert*, 2 Litt. 290.

§ 1095. **Notice of application for change.** Before an order for a change of venue shall be made, ten days' notice shall be given to the party, if he is in this State; if not, then to his agent or attorney, if he have one; if none, then by leaving the notice with the clerk of the court in which the action is pending, who shall immediately indorse it filed, and put it with the papers in the action.

§ 1096. **Application by petition—verified by affidavits—counter-affidavits.** Application for an order for a change of venue must be made by petition, verified by the affidavit of the party, supported by the affidavits of at least two credible housekeepers of the county in which the action is pending. The adverse party may file affidavits controverting the grounds relied upon for the change of venue, and the court may hear other evidence for or against the application, and shall exercise a sound discretion in deciding the question.

§ 1097. **Circuit court of adjacent county—terms and conditions.** A change of venue shall be made to the circuit court of an adjacent county most convenient to the parties to the action, their witnesses and attorneys, to which there is no valid objection; and the order may be made subject to such equitable terms and conditions as safety to the rights of the parties may require, and the court or judge, in his discretion, may prescribe.

§ 1098. **Order void unless expense of removal paid in ten days.** The order shall be void, unless the party obtaining it, within ten days, pays to the clerk ten cents a mile going and returning for the expense of travel in making the removal.

§ 1099. **Clerk's duty upon receipt of order.** Immediately upon the making, or receipt, of the order, the clerk shall make out a transcript of the orders pertaining to the cause, which, with the original papers therein, he shall, as soon as practicable, carry or send by some discreet person to the clerk of the court to which the cause is removed, the former clerk being responsible for the conduct of the person employed.

§ 1096. **Irregularity in ordering change—correction.** A change of venue to a county in another judicial district, on the affidavit alone of the party applying for the change, although irregular, is not void; and if, on motion of the adverse party to remand, the party obtaining the change supplies the necessary affidavits, the court may refuse to remand the case. *Triplett v. Scott*, 5 Bush 81.

§ 1097. **Adjoining county.** The evident meaning of the statute is to confine the parties to a trial in the county in which the action is brought, or to an adjoining county, unless some available objection is made or consent given. It is error to change the venue to a county not adjoining simply because counsel can not agree on one adjoining. *Miller v. Cabell*, 81 Ky. 178.

§ 1100. **When removed case stands for trial.** If the papers are transferred ten days before the first day of the next term of the court to which the cause is removed, it shall stand for trial at that term, otherwise not until the term next succeeding.

§ 1101. **Power of court to which cause removed.** The court to which the cause is removed shall have the same power as to its trial and final disposition as that from which it came.

§ 1102. **One removal or application only from same party.** There shall not be more than one order of removal of the same cause at the instance of the same party, nor shall the court entertain more than one application for a removal of a cause by the same party.

§ 1103. **Application, cause for continuance at first term.** At the appearance term of a civil suit, if a party desires a change of venue, he shall state the facts and reasons therefor in an affidavit, which shall be good cause for a continuance, if deemed sufficient by the court, provided the application for a change of venue be made during the term.

§ 1104. **Transfer by judge of cases triable by the court.** If in a chancery case, or an action or motion to be tried by the court, the regular judge can not preside and a special judge is not agreed upon or elected, the regular judge may transfer the case or action or motion to the most convenient county in an adjoining circuit, where it shall be disposed of as if originally brought in that court.

ARTICLE 2.

IN INFERIOR COURTS.

§ 1105. **County or quarterly court to circuit court.** Change of venue of any and all causes and motions pending in any county or quarterly

§ 1100. **Case stands for trial—when.** If the case would stand for trial at the succeeding court of the county from which it is removed, and the papers are filed in the clerk's office of the court to which it is removed ten days before the ensuing court, it will stand for trial at that term. *Dale v. Hays*, 14 B. M. 316.

§ 1101. (1) **Objection to change waived** by a subsequent appearance in, and failure to object to, the jurisdiction of the court to which the action was transferred. *Vinsen v. Lockard*, 7 Bush 458.

(2) **Remanding case.** Though the change was irregular in being made upon the af-

fidavit of the party alone, the court to which the change is made has the right, upon the requisite affidavits being supplied, to refuse to remand the case. *Triplett v. Scott*, 5 Bush 81.

(3) No appeal lies from a judgment of a circuit court remanding a case, such judgment not being final. *Turner v. Browder*, 18 B. M. 825.

§ 1105. **Proceeding for probate of will.** There can be no change of venue in cases for the probate of the wills in the county court. If the county judge can not act, the nearest justice must preside. *Bryam v. Holliday*, 84 Ky. 18.

court shall be granted in the same manner, under the same limitations and restrictions, and for the same causes, as are prescribed in this article authorizing changes of venue in civil cases in the circuit court. The change of venue shall be made to the circuit court of the county in which the cause or motion may be pending, unless there be a legal ground of objection to the judge of the circuit court, or to the trial of the cause or motion in that county, in which case the change of venue shall be awarded to the circuit court of the nearest county to which the objection does not apply; and the mode of trial and rules of procedure shall be the same prescribed for the trial of such cause or motion in the court from whence the same may be removed, so far as the same are applicable.

§ 1106. **Original papers transmitted—when remanded—duties of clerks.** When any change of venue shall be so ordered, the judge or clerk of the county or quarterly court, as the case may be, shall send the original papers, together with a transcript of all orders which have been made in the cause or motion, to the clerk of the court to which the change of venue is awarded, and upon disposing of the matter the court, according to the nature of the case, shall direct whether the original papers shall remain, or whether they shall be remanded to the court from whence they came. When they are remanded, the clerk of the circuit court shall retain a special statement of the taxation of costs, and return the original papers, with copies of all orders made in the premises by the circuit court, to the court from whence they came; and when any paper is so returned, which, according to the order or judgment of the circuit court ought to be recorded in the county court office, it shall be so recorded by the county court clerk, together with so much of the order of the circuit court as shall be necessary to place the same properly on record.

§ 1107. **Justices', police courts—when may be demanded.** A party to a suit pending before a justice or police or city judge shall have a change of venue to another justice of the same county when he shall make oath that he believes he can not have a fair trial in the court in which the cause is pending, and the cause may be tried out of term time by the justice to whose court it is removed.

§ 1108. **Justice not attending or disqualified another may act.** If the justice before whom a cause is returned for trial does not attend, or can not try the same, any other justice of the same county may attend and try and decide the cause.

ARTICLE 3.

IN CRIMINAL CASES.

§ 1109. **Application of defendant or Commonwealth—adjacent county.** When a criminal or penal prosecution is pending in any circuit court, the judge thereof shall, upon the application of the defendant or the Commonwealth, order the trial to be had in some other adjacent county to which there is no valid objection, if it appears that the defendant or the Commonwealth can not have a fair trial in the county where the prosecution is pending; and if the judge is satisfied that a fair trial can not be had in an adjacent county, he may order the trial to be had in the most convenient county in which a fair trial can be had.

§ 1109. (1) **Adjoining county—objection.** Where, upon motion of the defendant and by consent of the attorney for the State, a change of venue is had to a county not adjoining the one in which the offense was committed, it is too late, after trial and conviction, for the defendant to object to the jurisdiction of the court. *Lightfoot v. Com.*, 80 Ky. 516; *Hourigan v. Com.*, 94 Ky. 520.

(2) Upon an application for change of venue, when all the adjoining counties in the district have been objected to, it is proper to send the case to an adjoining county in another district. An error in deciding as to what county the case is to be sent does not invalidate the proceedings. *Kennedy v. Com.*, 78 Ky. 447.

(3) Where objection is made to the county where the court proposes to send the case, the objection must be a valid one, and the court may hear proof on this point, both upon the part of the accused and the Commonwealth. *Mickey v. Com.*, 13 Bush 237.

(4) **Burden upon applicant to make out case.** To entitle the defendant to a change of venue, the *onus* is on him to at least make out a *prima facie* case. The mere filing of a petition without affidavits or oral testimony to support it is not sufficient. *Wilkerson v. Com.*, 88 Ky. 29; *Hasson v. Com.*, 10 R. 1054. Weight to be given to the judgment refusing the

change. *Dilger v. Com.*, *Id.*, 550. When the evidence shows that there are reasonable grounds to believe that the defendant can not have a fair trial in the county where the offense is committed, it is the duty of the court to grant the change. *Johnson v. Com.*, 82 Ky. 116.

(5) **Discretion of court.** The trial court has a sound discretion in determining whether or not a motion for a change of venue should be sustained, and its conclusions will not be disturbed unless palpably abused. *Howard v. Com.*, 15 R. 873; *Wren v. Com.*, 8 R. 418; *Hasson v. Com.*, 10 R. 1054.

(6) **Jurisdictional facts.** The statements contained in the affidavit showing the necessity for a change of venue are not jurisdictional facts. *Lightfoot v. Com.*, 80 Ky. 516; *Smith v. Com.*, 95 Ky. 322.

(7) **New indictment.** Where a case is transferred by Commonwealth, the court of county from which transfer is made loses all jurisdiction over case, and an indictment found in that county against defendant for same offense is a nullity, although indictment transferred has been filed away. *Smith v. Com.*, 95 Ky. 322.

(8) **Right of Commonwealth.** The Legislature may, by a general law, provide for a change of venue in criminal cases upon motion of the Commonwealth as well as upon motion of the defendant.

§ 1110. Application by defendant—affidavits—notice—nearest county—evidence. Such application, if made by defendant, must be made by petition in writing, verified by the defendant; and the applicant must produce and file the affidavits of at least two other credible persons, not of kin to nor of counsel for the defendant, stating that they are acquainted with the state of public opinion in the county or counties objected to, and that they verily believe the statements of the petition for such change of venue are true; and the attorney for the Commonwealth, or in his absence from the county the county attorney, must have reasonable notice, in writing, of such application. If objections are taken and sustained to all the adjoining counties, then the change shall be made to the nearest county to which there is no valid objection, giving preference to counties of the same judicial district. The application must be made and determined upon in open court, during a regular or called term, and the court shall, on said motion, hear all the witnesses that may be produced by either party, and from the evidence determine whether or not the applicant is entitled to a change of venue.

§ 1111. Application by Commonwealth—petition—notice. If the application is made by the Commonwealth, a petition stating the reasons therefor and signed by the Commonwealth's attorney shall be filed in court, and reasonable notice in writing of the time when the application will be made must be given to the defendant, or, if he be absent from the county, to his attorney; and the application shall be heard and determined as provided in the next preceding section.

§ 1112. Removal from county in state of lawlessness—expense paid by county. Whenever any judge shall be satisfied from his own knowledge, and from the written statement of the Commonwealth's attorney, that such a state of lawlessness exists in any county that the officers will be prevented from discharging their duty, or the jurors be deterred from rendering an impartial verdict, he may order the prosecution removed to some other county in which a fair trial can be had; and

Com. v. Davidson, 91 Ky. 162; Con., sec. 11; 95 Ky. 322.

(9) **Right of defendant to change of venue.** When required, petition and affidavits are filed by defendant; if no witnesses are introduced by either party he is entitled to a change of venue and the court has no discretion. Higgins v. Com., 94 Ky. 54.

(10) **Waiver of objection to jurisdiction.** Where a case in which there has been a change of venue is transferred back to original county on motion of defendant,

he can not complain of the jurisdiction of the court. Hourigan v. Com., 94 Ky. 520.

(11) Where a defendant has obtained a change of venue without observing the formalities required by the statute, he can not, after trial, question jurisdiction of court. 94 Ky. 520.

§ 1110. Evidence. On application for change of venue, the court shall hear all witnesses that may be produced by either party, and from the evidence determine

the fiscal court of the county from which such removal is made shall allow and pay the costs thereof out of the county levy.

§ 1113. **Proceedings when defendant is in custody or on bail.** If the applicant or defendant is in custody the order for the change of venue shall be accompanied by an order for his removal by the sheriff or jailer of the county, with such sufficient guard as the judge may direct, and his delivery to the jailer of the county where the trial is to be had. If the applicant or defendant is under recognizance or bond for his appearance, he shall, before the order is granted, give sufficient bail for his appearance at the proper court, or be surrendered into the custody of the proper officer.

§ 1114. **Recognizances of witnesses—preparation for trial.** The court shall also take recognizances of the witnesses for their appearance at the proper court, and make such order as may be deemed necessary to a fair, full and speedy trial upon the merits of the case.

§ 1115. **Duty of clerk—original papers—copies—mileage.** When the prosecution is so removed, the clerk of the court shall immediately transmit the original papers, together with a transcript of the orders pertaining thereto, to the clerk of the court to which the removal is ordered, after making out and retaining a copy of such original papers. The transfer shall be made by the clerk, his deputy or some discreet person for whom the clerk shall be responsible. The applicant, if the defendant, shall, before such order of removal is made, pay the clerk for making such copy, and also ten cents a mile for necessary travel in going and returning in making such transfer.

§ 1116. **Change allowed to one of several defendants—original papers retained.** If one, or some, only of several defendants charged in the same indictment apply for or be allowed the change of venue, the original indictment shall be retained, and a certified copy sent, which shall serve in lieu of the original.

§ 1117. **Proceedings in court to which removal made.** The court to which the removal is so made shall have the same jurisdiction to dispose of the case as the court has from which it was removed; and if the indictment be quashed or *nolle prosequi* entered, a new indictment may be found, from time to time, by a grand jury of the county to

whether or not the applicant is entitled to a change of venue. *Hicks v. Com.*, 3 R. 87; *Johnson v. Com.*, 82 Ky. 116; *Wren v. Com.*, 8 R. 418.

§ 1117. **New indictment.** Right of accused to demand that he shall be indicted by the grand jury of the county

(37)

where the offense was committed is not, like the right to be tried by a petit jury, an absolute and indefeasible right which can not be surrendered. By obtaining a change of venue accused waives his right to object to a new indictment, found by the grand jury of the county to

which the removal is made, and the same prosecuted until the case is finally disposed of, as though the offense had been committed in that county.

§ 1118. **One application or change of venue only allowed.** Not more than one change of venue or application therefor shall be allowed to any person or the Commonwealth in the same case.

§ 1119. **Removal at instance of Commonwealth—costs to be paid by county.** If the change of venue is granted to or on the application of the Commonwealth, all the costs of the removal shall be paid by the county from which the removal is had, in the same manner as other claims against the county are paid.

§ 1120. **Return to county having original jurisdiction—when ordered.** That whenever the judge of any circuit court in this Commonwealth, in which an indictment charging the defendant or defendants with a felony is or may be pending, by change of venue from the county where the alleged crime was committed on the ground that there existed at the time the venue was changed a state of lawlessness among the citizens of such county by which the officers were prevented from discharging their duties, or jurors deterred from rendering impartial verdicts through fear or otherwise, shall be satisfied from personal knowledge, or from reliable information furnished in court by affidavit or oral testimony, that a state of lawlessness sufficient to prevent officers and jurors from discharging their duties no longer existed in said county, it shall be the duty of the court to transfer the cause to the circuit court of the county where the indictment was found.

§ 1121. **Motion for re-transfer—by whom to be made.** Such transfer may be made upon motion of the attorney-general or of the Commonwealth's attorney, regular or *pro tem.*, of the district which includes the county where the indictment is pending, upon ten days' notice in writing to the defendant or defendants in the indictment, unless notice be waived in open court by the defendant or defendants.

§ 1122. **Removal of defendant in custody—defendant under bond.** If the defendant or defendants be in custody at the time such transfer is ordered, the court shall make an order for his or their removal by

which the case was removed, where the first indictment has been quashed or a *nolle prosequi* entered. *Parker v. Com.*, 12 Bush 191; *Jennings v. Com.*, 13 R. 79; but indictment can not be found in court from which case was transferred. *Smith v. Com.*, 95 Ky. 322.

§ 1118. **Right to change of venue** is a creature of the statute, and the extent of its exercise may be limited by statute. The Legislature has the power to provide that only one change of venue shall be allowed to any person in the same case. *Dilger v. Com.*, 88 Ky. 550.

the sheriff or jailer of the county, with such sufficient guards as the court may direct, and his or their delivery to the jailer of the county to which the transfer is made. If the defendants are under bond or recognizance at the time the transfer is ordered, they shall execute new bail bonds, with sufficient surety, to be approved by the court, for their appearance on the first day of the next term of the court to which the transfer is made, and all other conditions as required by law, providing for the execution of bail bonds, or in default of bail they shall be taken into custody and conveyed to the county to which the transfer is made, and delivered to the jailer as hereinbefore provided.

§ 1123. **Witnesses to be recognized.** The court ordering the transfer shall take the recognizances of all witnesses for their appearance at the proper court, and make such other orders as may be deemed necessary to secure a speedy and impartial trial of the case.

§ 1124. **Clerk to transmit papers and transcripts of record.** The clerk of the court shall immediately transmit the original papers, together with a transcript of the record pertaining thereto, to the clerk of the court to which the transfer is made, after making out and retaining in his office a copy of the original papers. The transfer of the papers shall be made by the clerk or his deputy, or some discreet person to be selected by the clerk for that purpose.

§ 1125. **Costs of transfer—county to pay.** The county court of the county from which such transfer shall be made shall allow, as claims against such county, the costs of such transfer, to be paid out of the county levy thereof. The fees of officers shall be the same as now provided by law in cases of change of venue on motion of defendant.

§ 1126. **Prosecutions pending before county or police judge, or justice.** In any criminal or penal prosecution pending before the county judge, or a justice or police or city judge, either party may have a change of venue to a justice's court for the same reasons that a change may be granted in civil cases pending in justices' courts; and if a change is granted, the trial shall be had, before the justice to whose court the case is transferred, in the manner provided for the trial of civil cases.

§ 1124. **Record — transmission of.** Provision of sec. 1100, Ky. Stat., that case shall stand for trial at term when papers

have been filed ten days before its commencement does not apply to criminal cases. *Hourigan v. Com.*, 94 Ky. 520.

CHAPTER VI.

LAWS OF THE UNITED STATES UPON THE SUBJECT OF THE
REMOVAL OF ACTIONS AND PROSECUTIONS FROM
STATE TO FEDERAL COURTS.

[Extracts from Revised Statutes of the United States.]

§ 641. Causes against persons under "civil rights" laws—proceedings. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the

§ 641. Criminal prosecutions — removal of. *Virginia v. Paul*, 148 U. S. 107; *Tennessee v. Davis*, 100 U. S. 257; *Davis v. South Carolina*, 107 U. S. 597; *Cunningham v. Neagle*, 135 U. S. 1.

Actions that may be removed. *West v. Aurora*, 6 Wall. 139; *Green v. Custard*, 23 How. 484; *Bondurant v. Watson*, 103 U. S. 281; *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 15 How. 198; *Searl v. Lake Co. School*, 124 U. S. 197.

Amount in controversy must exceed two thousand dollars. *Ex parte Pennsylvania Co.*, 137 U. S. 451; *Marshall v. Holmes*, 141 U. S. 589.

Grounds of removal—diverse citizenship. *Stevens v. Nichols*, 130 U. S. 230; *Peper v. Fordyce*, 119 U. S. 469; *Removal Cases*, 100 U. S. 457; *Crehore v. O. & M. R. R. Co.*, 131 U. S. 240; *Young v. Ewart*, 132 U. S. 267; *Graves v. Corbin*, 132 U. S. 571; *Kellam v. Keith*, 144 U. S. 568.

Time of removal and proceedings to remove. *Core v. Vinal*, 117 U. S. 347; *Holland v. Chambers*, 110 U. S. 59; *Alley v. Nott*, 111 U. S. 472; *Edrington v. Jefferson*, 111 U. S. 770; *Pullman Car Co. v. Speck*, 113 U. S. 84; *Removal Cases*, 100 U. S. 457; *Phoenix Ins. Co. v. Pechner*, 95 U.

next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony and other proceedings in the case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process: and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the circuit court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition or complaint in the cause; and, in case of his default, may order a non-suit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed.

S. 183; *Crehore v. O. & M. R. R. Co.*, 131 U. S. 240; *Kansas City R. R. Co. v. Daughtry*, 138 U. S. 298; *Marshall v. Holmes*, 141 U. S. 589; *Fish v. Henarie*, 142 U. S. 459; *Pennsylvania Co. v. Bender*, 148 U. S. 255.

Prejudice or local influence entitling party to removal. *Gains v. Fuentes*, 92 U. S. 10; *Hancock v. Holbrook*, 119 U. S. 586; *B. & O. R. R. Co. v. Bates*, 119 U. S. 464; *Ex parte Pennsylvania Co.*, 137 U. S. 451; *Fish v. Henarie*, 142 U. S. 459.

Corporation is citizen of State creating it in meaning of this statute. *Kansas Pacific R. R. v. Atchison R. R.*, 112 U. S. 414; *Barren v. Burnside*, 121 U. S. 186; *Home Ins. Co. v. Morse*, 20 Wall. 445.

Right of one of several parties to removal. *Little v. Giles*, 118 U. S. 596; *Brooks v.*

Clark, 119 U. S. 502; *L. & N. R. R. Co. v. Ide*, 114 U. S. 52; *Graves v. Corbin*, 132 U. S. 571; *Mitchell v. Smale*, 140 U. S. 406; *Torrence v. Shedd*, 144 U. S. 527; *City of Bellaire v. B. & O. R. R.*, 146 U. S. 117.

Decisions of Court of Appeals of Kentucky on removal of causes. *Howland C. and I. Works v. Brown*, 13 Bush 681; *Alexander v. Gish*, 88 Ky. 13; *Hall v. Ricketts*, 9 Bush 366; *Edwards v. Ward*, 2 Bush 606; *Short v. Wilson*, 1 Bush 350; *Eifort v. Berins*, 1 Bush 461; *Savings Bank v. Benton*, 2 Met. 240; *Tibbatts v. Berry*, 10 B. M. 473; *Eastin v. Rucker*, 1 J. J. M. 232; *Parberry v. Goram*, 3 Bibb 107; *Shepherd v. Young*, 1 Mon. 203.

Action against receiver — practice. See *Hardwick v. Kean*, 95 Ky. 563.

§ 642. **Petitioner in custody of State court, writ of habeas corpus to be issued.** When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said circuit court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said circuit court according to law and the orders of said court or in vacation of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

§ 643. **Action or prosecution against revenue or election officer—habeas corpus.** When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of Title XXVI, "The Elective Franchise," or on account of any right, title or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had

proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition or another process, except *capias*, the clerk of the circuit court shall issue a writ of *certiorari* to the State court, requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by *capias*, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial or judgment therein in the State court shall be void. And if the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the State court can be obtained, the circuit court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant.

§ 644. **Action by alien against civil officer of United States—removal of.** Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the circuit court of the United States in and for the district in which the defendant shall have been served with the process in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section.

§ 645. **Copies of records in State court—when may be supplied.** In any case where a party is entitled to copies of the record and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and

the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof on demand as aforesaid, direct such record to be supplied by affidavit, or otherwise, as the circumstances of the case may require and allow: and, thereupon, such proceeding, trial and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

§ 646. **Attachments—injunctions—bonds issued or taken in State court.** When a suit is removed for trial from a State court to a circuit court, as provided in the foregoing sections, any attachment of the goods or estate of the defendant by the original process shall hold the same to answer the final judgment, in the same manner as by the laws of such State they would have been held to answer final judgment had it been rendered by the court in which the suit was commenced; and any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into which the cause is removed; and any bond of indemnity or other obligation, given by the plaintiff upon the issuing or granting of any attachment, writ of injunction or other restraining process, against the defendant petitioning for the removal of the cause, shall also continue in full force and may be prosecuted by the defendant and made available for his indemnity in case the attachment, injunction or other restraining process be set aside or dissolved, or judgment be rendered in his favor, in the same manner, and with the same effect as if such attachment, injunction or other restraining process had been granted, and such bond had been originally filed or given in such State court.

ACT OF MARCH 3, 1875.

[SUPPLEMENT TO REVISED STATUTES, PAGE 83.]

§ 4. **Attachments and bonds taken in State court not affected—injunction.** That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced.

And all bonds, undertakings or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal.

And all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

§ 5. Action improperly removed to be dismissed or remanded. That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit, have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just. [*Lines omitted expressly repealed by act of August 13, 1888.*]

§ 6. Proceedings in actions after removal. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

§ 7. Time to file record—appearance—penalty for refusing to furnish copy—certiorari. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf.

That if the clerk of the State court in which any such cause shall be pending shall refuse, to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to which said action or proceeding

was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both, in the discretion of the court.

And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of *certiorari* to said State court, commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law.

And if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding.

But if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

§ 8. Action to enforce lien—service on non-resident—judgment—time to set aside judgment. That when in any suit, commenced in any circuit court in the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be.

Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such

manner as the court may direct, not less than once a week for six consecutive weeks.

And in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district.

But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.

And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State :

Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just ; and thereupon said suit shall be proceeded with to final judgment according to law.

§ 9. Death of party after judgment and before expiration of time to appeal— That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid.

The representatives of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error as the party he represents might have done.

If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representative shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought.

§ 10. **Repealing clause.** That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

ACT OF AUGUST 13, 1888.

[SUPPLEMENT TO REVISED STATUTES, PAGE 611.]

Jurisdiction of circuit courts—venue—action by assignee—appellate jurisdiction. That the act approved March third, eighteen hundred and eighty-seven, entitled “An act to amend sections one, two, three and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, approved March third, eighteen hundred and seventy-five,” be and the same is hereby amended so as to read as follows:

“That the first section of an act entitled ‘An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes, approved March third, eighteen hundred and seventy-five, be, and the same is hereby amended so as to read as follows:

“That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdictions with the district courts of the crimes and offenses cognizable by them.

“But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court.

“And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any

other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

“Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

“And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.”

That the second section of said act be and the same is hereby amended, so as to read as follows:

“§ 2. **Removal of actions arising under laws of United States or on account of prejudice or local influence.** That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.

“Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

“And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

“And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such

suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause.

“Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

“At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

“Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.”

That section three of said act be and the same is hereby amended so as to read as follows:

“§ 3. Petition and bond—proceedings—actions involving title to land. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or at any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer

or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein.

“It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit.

“And the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court.

“And if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial.

“And if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district.

“And any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.”

§ 2. Receivers to manage property according to State laws—penalty. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property,

such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 3. Actions against receivers. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed.

But such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

§ 4. National banks—actions concerning. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

And in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

§ 5. Laws not repealed by this act. That nothing in this act shall be held, deemed or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the Act of Congress of which this act is an amendment, or in the Act of Congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

§ 6. Repealing clause. That the last paragraph of section five of the Act of Congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts

of the United States and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed :

Provided, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act.

CHAPTER VII.

RULES OF COURT OF APPEALS, ADOPTED JANUARY, 1895.

The following were ordered to be recorded as rules of practice of the court :

1. Division of court into two departments—sessions—chief justice's powers and duties. In accordance with section 118 of the Constitution, this court, after January 1, 1895, will be divided into two departments, each one of which shall consist of three judges, besides the chief justice, who shall preside over each department. Each division shall sit on alternate days during each week, when not in joint session, to hear arguments and motions and deliver opinions. Opinions shall be delivered as the judgment of the court without reference to the department delivering them. When the chief justice is absent, or, if present, from any cause fails to preside, the judge next oldest in commission shall preside with each department, and shall require the presence of a judge from either department when necessary to constitute a majority of the entire body. The cases, when submitted, shall be assigned by the chief justice to each department, and in such a manner as to equalize the burden.

2. Full court to hear and decide cases—when. Whenever a case involves a constitutional question, either Federal or State, or in any case where, in the opinion of the chief justice, the importance of the case requires, both departments shall hear the argument, whether oral or written, and pass on the questions involved; and in cases where the judges composing one department do not concur, it shall be the duty of the chief justice to notify the other department, and have the questions at issue disposed of in joint session.

When a majority of either department, including the chief justice, shall desire a joint session for the purpose of passing on any

question, or hearing any cause, the entire body shall be assembled for that purpose.

3. Briefs when to be filed—penalty for failure—oral argument—order of trial—docket. That in all cases or appeals hereafter filed, or now filed and not submitted, it shall be the duty of the appellant to file his brief twenty days prior to the day the case is set for hearing, and the appellee to file his brief ten days prior to that time, and a failure to do so by the appellant shall cause a dismissal of the appeal without prejudice, and upon part of appellee, he will, if in default, be required to pay the costs up to the date of filing his brief. No oral argument will be ordered or heard on the part of the party in default unless his brief is filed as herein provided. When the briefs are in, or the brief of the party not in default, an oral argument will be ordered if desired, and a time fixed for the hearing, unless the parties are ready to proceed when the case is called.

All cases will be decided as nearly as practicable in the order of their submission.

After all cases heretofore submitted for argument, and the submitted cases, shall be disposed of, a docket embracing all pending cases will be published in sufficient time to enable parties to comply with the rules of this court.

4. Two arguments allowed on each side—time limited. But two oral arguments on each side will be allowed in any case, and every such argument will be limited to one hour.

5. Records not properly made out or indexed condemned—duty of clerk. Records not made out in a legible handwriting, or not indexed, are to be condemned, and the clerk making out such record to be prohibited from collecting anything therefor; and the clerk of this court will disregard the expense thereof in taxing cost without any special order in the case.

6. Rehearing—when granted. When two members of a department desire it, a rehearing shall be granted.

7. Old record required in pending case—penalty for failure to place with new record. When the record of a former appeal in the same cause is necessary to the decision of a subsequent appeal, or when a record already in this court is made part of a record in another case, and not copied into the transcript, the attorney for the appellant must see to it, on pain of having the appeal dismissed, that such old record is placed with the new record before the cause is submitted.

8. Motion to require clerk or party to pay costs of unnecessary record. A party intending to move that the clerk of the inferior court, or

the adverse party, shall be adjudged to pay the costs resulting from a violation by such clerk or party of subsection 11, of section 737, of the Civil Code, shall make such motion at or before the submission of the cause, and not thereafter; and such motion shall indicate the portions of the record claimed to have been improperly copied and the pages of the transcript where they may be found.

9. Notice to clerk of motion. If the motion is against the clerk, he must be served with a copy of the written motion at least five days before the cause is submitted.

10. Withdrawal of record—penalty for failing to return in time. If an appellant or his attorney, or an appellee with a cross-appeal, or his attorney, shall, for any purpose, withdraw the record from the clerk's custody without the special order of the court, and fail or neglect to produce it in court on call of the case for submission or argument, the appeal or cross-appeal, on motion of the adverse party, shall be dismissed for want of proper prosecution.

11. Delay case—notice of motion to affirm. Ten days' notice of a motion to affirm as a delay case must be given appellant or his attorney, otherwise such motion will not be heard until the case is called for trial on the day it is set on the docket.

12. Rehearing—filing petition for in vacation—extension of time to file. Where time is extended to file a petition for rehearing, and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the clerk in the clerk's office within the time shall be held sufficient. The clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the judges.

13. Rehearing—judge who shall not consider petition for. Petitions for rehearing shall be considered by a judge other than the one who delivered the opinion in the case.

14. Terms of court—three each year. *Ordered,* That there be held three terms of the Court of Appeals in each year, as follows:

September term, beginning third Monday in September, and ending the second Saturday in December.

January term, beginning first Monday in January, and ending the last Saturday in March.

April term, beginning second Monday in April, and ending first Saturday in July.

FORMS IN CIVIL ACTIONS.

PETITIONS.

[What pleadings must be verified, sec. 116; by whom to be verified, sec. 117; forms of verification, page 627; how and before whom verified, secs. 551, 549; when may be verified, and waiver of verification, secs. 137, 138; and see note 44, page 72.]

Partners—by.

[See note 42, page 71.]

James Giles and Henry Allen, partners, doing business under the firm name of Giles & Allen, Plaintiffs, vs. James Jones, Defendant.	}	— CIRCUIT COURT. Petition.
---	---	-----------------------------------

The plaintiffs, James Giles and Henry Allen, partners, doing business under the firm name of Giles & Allen, state [here state cause of action].

Partners—against.

[See note 42, page 71.]

James Jones, Plaintiff, vs. James Giles and Henry Allen, partners [or late partners, if firm has dis- solved], doing business under the firm name of Giles & Allen, Defendants.	}	— CIRCUIT COURT. Petition.
--	---	-----------------------------------

The plaintiff, James Jones, states that the defendants, James Giles and Henry Allen, are partners [or late partners, if firm has dissolved], doing business [or lately doing business] under the firm name of Giles & Allen, and that [here state cause of action].

Administrator—against.

[See note 1, page 98.]

John Smith, Plaintiff, vs. James Jones, Administrator of Henry Allen, Defendant.	}	— CIRCUIT COURT. Petition.
---	---	-----------------------------------

The plaintiff, John Smith, states that on the — day of —, 189—, Henry Allen died, a resident of — county, Kentucky, and on — 10, 189—, the defendant, James Jones, was, by order of the county court of said county, appointed administrator of his estate, and thereupon qualified and is now acting as such administrator. Copies of the orders showing his appointment and qualification are filed as part hereof, marked "A." That [here state cause of action].

Executor—by.

[See note 1, page 98.]

James Giles, Executor of John Smith, Plaintiff,	}	Petition.	— CIRCUIT COURT.
vs.			
James Jones, Defendant.			

The plaintiff, James Giles, states that on the — day of —, 189—, John Smith, then a resident of — county, Kentucky, died, having made and published his last will, which was, on the — day of —, 189—, admitted to probate by the county court of said county, and thereupon the plaintiff who was nominated in said will as executor qualified in said court, and is now acting as such executor. Copies of the orders of said court showing his qualifications are filed as part hereof, marked "B." That the defendant, James Jones [here state cause of action].

Administrator—by.

[See note 1, page 98.]

John Smith, Administrator of Henry Jones, Plaintiff,	}	Petition.	— CIRCUIT COURT.
vs.			
James Jones, Defendant.			

The plaintiff, John Smith, states that on the — day of —, 189—, Henry Jones died intestate a resident of — county, Kentucky, and on the — day of —, 189—, the plaintiff was, by an order of the county court of said county, appointed administrator of his estate, and thereupon qualified and is now acting as such administrator. Copies of order of said court showing his appointment and qualification are filed as part hereof, marked "A," that defendant, James Jones [here state cause of action].

Administrator With the Will Annexed—Against.

[See Ky. Stat., secs. 3890-3893.]

James Jones, Plaintiff,	}	Petition.	— CIRCUIT COURT.
vs.			
Henry Smith, Administrator with the will annexed of John Brown, Defendant.			

The plaintiff, James Jones, states that on the — day of —, 189—, John Brown, then a resident of — county, Kentucky, died, having made and published his last will, which was on the — of —, 189—, admitted to probate by the county court of said county. He states that said will did not nominate any person as executor [or —, the person nominated as executor, declined to act] and that on the — of —, 189—, the defendant, Henry Smith, was, by order of said court, appointed administrator with the will annexed of said Brown, and thereupon qualified and is now acting as such administrator. Copies of the order of said court showing the probate of said will and the appointment of defendant as administrator aforesaid are filed as part hereof, marked "A." He states [here state cause of action].

Committee, Curator, Trustee or Guardian.

In an action by or against a committee, curator, trustee or guardian, the petition should state facts in the manner set out in preceding forms, showing the appointment and qualification of the fiduciary, and there should be filed with it the orders of the court in reference thereto.

Corporation—by.

The Acme Pin Company, Plaintiff, } — CIRCUIT COURT.
 ^{vs.} }
 John Jones, Defendant. } Petition.

The plaintiff, the Acme Pin Company, states that it is a corporation created under the laws of [here give name of State under laws of which corporation was organized], and authorized to sue and be sued, contract and be contracted with, and conduct the business of [here state business corporation is engaged in], under and by its corporate name, "The Acme Pin Company." It states [here state cause of action].

If action is against a corporation this form will illustrate how it should be sued.

On Note.

[See notes 53, 54, page 78.]

John Smith, Plaintiff, } — CIRCUIT COURT.
 ^{vs.} }
 James Jones, Defendant. } Petition.

The plaintiff, John Smith, states that the defendant, James Jones, by his promissory note, dated —, 189—, and executed and delivered to plaintiff, agreed to pay him — thereafter — dollars, with six per cent interest thereon from — until paid. Said note is filed as part hereof, marked "A," and is due, and no part of it has been paid [except—if the note is entitled to any credits here state them].

Wherefore plaintiff prays judgment for his debt, cost and all proper relief.

J. R., Atty. for Plff.

Assignee Against Payor of Note.

[When assignee required to secure costs, sec. 619.]

John Smith, Plaintiff, } — CIRCUIT COURT.
 ^{vs.} }
 James Jones, Defendant. } Petition.

The plaintiff, John Smith, states that the defendant, James Jones, by his promissory note, dated —, 189—, and executed and delivered to Henry Allen, agreed to pay him six months thereafter — dollars, with six per cent interest thereon from — until paid; on —, 189—, Henry Allen assigned said note to plaintiff by written indorsement thereon. Said note is filed as part hereof, marked "A," and is due, and no part of it has been paid.

Wherefore plaintiff prays judgment for his debt, costs and all proper relief.

J. R., Atty. for Plff.

Lost Note.

[When plaintiff must tender defendant a bond, sec. 7.]

John Smith, Plaintiff, } — CIRCUIT COURT.
 ^{vs.} }
 James Jones, Defendant. } Petition.

The plaintiff, John Smith, states that the defendant, James Jones, by his promissory note, dated —, 189—, and executed and delivered to plaintiff, agreed to pay him thereafter — dollars, with six per cent interest thereon from — until paid. No part of said amount has been paid, although the whole thereof is due, and the note was, without fraud on the part of the plaintiff, lost and can not be filed herewith.

Wherefore plaintiff prays judgment for his debt, costs and all proper relief.

J. R., Atty. for Plff.

Merchant's Account.

[See notes 1, 2, page 68, and note 26, page 70.]

John Smith, Plaintiff, } — CIRCUIT COURT.
vs. }
 James Jones, Defendant. } Petition.

The plaintiff, John Smith, states that the defendant, James Jones, is indebted to him in the sum of — dollars, for goods and merchandise sold by plaintiff to defendant in the year —, the defendant agreeing when he bought the said goods to pay for them [state time goods were to be paid for] the prices charged in the account filed as part hereof, marked "A." Said debt is due and unpaid.

Wherefore plaintiff prays judgment for his debt with interest from [state time account became due] and all proper relief. J. R., Atty. for Plff.

Merchant's Account.

[See notes 1, 2, page 68, and note 26, page 70.]

John Smith, Plaintiff, } — CIRCUIT COURT.
vs. }
 James Jones, Defendant. } Petition.

The plaintiff, John Smith, states that the defendant, James Jones, is indebted to him in the sum of — dollars, balance due for goods and merchandise furnished and delivered by plaintiff to defendant at defendant's request during the year —.

He files as part hereof, marked "A," an account showing the character of goods and merchandise so furnished and delivered, the prices charged therefor, and the credits to which defendant is entitled, and states that all of said prices are reasonable, and there is due on said account the above amount, and said account became due —.

Wherefore he prays judgment for — dollars, with interest from [state time account became due], and all proper relief. J. R., Atty. for Plff.

Work and Labor.

[See note 13, page 69.]

John Smith, Plaintiff, } — CIRCUIT COURT.
vs. }
 James Jones, Defendant. } Petition.

The plaintiff, John Smith, states that the defendant, James Jones, is indebted to him in the sum of sixty dollars, balance due for work done as a farm hand for defendant by plaintiff in the months of May, June, July and August, in the year 189—, under a contract whereby defendant agreed to pay plaintiff for his services twenty dollars per month, payable at the end of each month. The defendant has paid to plaintiff on account of said services twenty dollars, leaving due and unpaid the sum aforesaid, which he refuses to pay.

Wherefore he prays judgment for his debt, with interest from —, 189—, and all proper relief. J. R., Atty. for Plff.

Slander.

[See note 55, page 73; and sec. 123 and notes page 99, and sec. 74.]

John Smith, Plaintiff, } — CIRCUIT COURT.
vs. }
 James Jones, Defendant. } Petition.

The plaintiff, John Smith, states that on —, 189—, the defendant, James Jones, in — county, Kentucky, in the presence and hearing of divers persons, falsely and maliciously spoke of and concerning plaintiff these words, "John Smith

stole my horse," thereby meaning that plaintiff had committed the crime of horse-stealing, to plaintiff's damage in the sum of — dollars. He states that defendant is a resident of said county [or the said words were spoken therein as the case may be].

Wherefore plaintiff prays judgment for — dollars and all proper relief.

J. R., Atty for Plff.

Seduction.

[See Ky. Stat., sec. 2, and notes thereto. If action is brought under statute, that part in brackets can be omitted.]

John Smith, Plaintiff, } — CIRCUIT COURT.
vs.
 James Jones, Defendant. } Petition.

The plaintiff, John Smith, states that about the — of May, 18—, the defendant, James Jones, did willfully and without the consent of plaintiff, debauch and criminally know his daughter, Mary Smith [then in the service of plaintiff], whereby the said Mary Smith became pregnant and sick with child [and so remained for the space of — months, and during said time she was unable to attend to her duties as servant of plaintiff, and he was thereby deprived of her services, and was obliged to and did expend — dollars in nursing and taking care of her during her said sickness, and was otherwise greatly injured] to his damage in the sum of — dollars.

Wherefore plaintiff prays judgment for — dollars and all proper relief.

J. R., Atty. for Plff.

Libel.

[See secs. 74 and 123 of Code and notes thereto.]

Henry Orr, Plaintiff, } — CIRCUIT COURT.
vs.
 James Lee, Defendant. } Petition.

The plaintiff, Henry Orr, states that the defendant, James Lee, is a resident of — county, Kentucky, and that on the — of —, 189—, he falsely and maliciously wrote of and concerning the plaintiff, these words [here state words complained of], and caused the same to be printed and published over his signature in a newspaper published and circulated in said county, and said article so printed and published was read by divers persons [or in a letter written and signed by defendant and addressed to one John Smith, he falsely and maliciously wrote of and concerning the plaintiff, these words [here state words complained of] and said letter was received by said Smith and read by him and other persons]. Plaintiff states that he was damaged by said publication [or letter] in the sum of — dollars.

Wherefore he prays judgment against defendant for — dollars and for all proper relief.

J. R., Atty. for Plff.

Malicious Prosecution.

[See Code, sec. 74; 82 Ky. 510; 91 Ky. 279; 9 Bush 788.]

A. R. Wallace, Plaintiff, } — CIRCUIT COURT.
vs.
 Thomas James, Defendant. } Petition.

The plaintiff, A. R. Wallace, states that the defendant, Thomas James, resides in — county and that he falsely, maliciously and without probable cause did on the — of — 189—, in the county of —, State of Kentucky, and before S. Bruce, county judge of said county, subscribe and swear to an affidavit charging that this plaintiff had committed the crime of larceny in the said county by stealing and

carrying away without the permission of the owner, property owned by one Abe Jones and of the value of — dollars, and thereupon said judge issued a warrant for the arrest of this plaintiff and under it he was arrested and brought before said judge for trial, who, after hearing the evidence, dismissed the prosecution and discharged from custody this plaintiff. He says he was damaged in the sum of — dollars by the said wrongful acts of defendant.

Wherefore he prays judgment against defendant for — dollars and for all proper relief.
J. R., Atty. for Plff.

Assault and Battery.

[Venue of action, sec. 74, and see note 4, page 69.]

John Smith, Plaintiff, }
vs. } Petition. — CIRCUIT COURT.
James Jones, Defendant. }

The plaintiff, John Smith, states that on — 189—, the defendant, James Jones, in — county, Kentucky, he being now a resident of said county, unlawfully assaulted, beat and bruised him about the head and body with his fists [or state weapon used] to his damage in the sum of — dollars. [If plaintiff desires to recover special damages for time lost, doctors' bills and other expense, the petition should state value of time, amount paid out and other expenses claimed.]

Wherefore he prays judgment for — dollars and all proper relief.
J. R., Atty. for Plff.

Surety Against Principal.

[See note 58, page 73; judgment may be obtained by motion, sec. 451.]

John Smith, Plaintiff, }
vs. } Petition. — CIRCUIT COURT.
James Jones, Defendant. }

The plaintiff, John Smith, states that he was the surety of the defendant, James Jones, in a note executed to David Adams, — 189—, for — dollars, and due in — months from date; that on — 189—, he paid to said Adams, in discharge of said note and interest due thereon, — dollars, and defendant refuses to pay him any part thereof.

Wherefore he prays judgment for — dollars, with — per cent interest thereon from — 189—, and all proper relief.
J. R., Atty. for Plff.

Trespass to Realty.

[See note 63, page 74.]

John Smith, Plaintiff, }
vs. } Petition. — CIRCUIT COURT.
James Jones, Defendant. }

The plaintiff, John Smith, states that on —, 189—, he was the owner of and in possession of a tract of land in — county, Kentucky, adjoining the lands of David Adams, William Sams and Tom Davis, and on said day the defendant, James Jones, unlawfully and forcibly entered upon said land, and cut and destroyed apple trees thereon to the damage of plaintiff in the sum of — dollars.

Wherefore plaintiff prays judgment for — dollars and all proper relief.
J. R., Atty. for Plff.

Recovery of Land.

[See sec. 125, and notes thereto.]

John Smith, Plaintiff, }
vs. } Petition. — CIRCUIT COURT.
James Jones, Defendant. }

The plaintiff, John Smith, states that he is the owner of and entitled to the pos-

session of a tract of land in — county, Kentucky, situated on the waters of Drennon creek, and bounded as follows, to-wit: Beginning at a stone in the center of said creek, corner to James Adams, and thence east — poles to a stone, thence south — poles to a stone, thence west — poles to a stone, thence north — poles to the beginning, containing — acres, and the defendant now holds, and has for the last year wrongfully held, said land, and kept plaintiff out of possession thereof to his damage in the sum of — dollars.

Wherefore plaintiff prays judgment for the recovery of said land and — dollars damages and all proper relief.

J. R., Atty. for Plff.

Recovery of Personal Property.

[See sec. 181, and form of affidavit for immediate delivery, page 630.]

John Smith, Plaintiff,	}	Petition.	— CIRCUIT COURT.
vs.			
James Jones, Defendant.			

The plaintiff, John Smith, states that he is the owner and entitled to the possession of [here describe property] and of the value of — dollars; that defendant has possession of said —, and has wrongfully detained — days, to plaintiff's damage in the sum of — dollars.

Wherefore plaintiff prays judgment for the recovery of said — and damages for — detention and all proper relief.

J. R., Atty. for Plff.

Railroad Co.—For Killing Cattle.

[If the property has not been appraised, or the plaintiff does not desire to claim the twenty-five per cent damages, that part of the petition included in brackets can be omitted; county in which action must be brought, sec. 73; for provisions concerning appraisal, see Ky. Stat., secs. 810, 811, 812 and notes thereto.]

John Smith, Plaintiff,	}	Petition.	— CIRCUIT COURT.
vs.			
The Louisville & Nashville Railroad Company, Defendant.			

The plaintiff, John Smith, states that the defendant, the Louisville & Nashville Railroad Company, is a corporation created by the laws of Kentucky, and authorized to be sued by its corporate name, "The Louisville & Nashville Railroad Company;" that it operates a line of railroad running through — county, Kentucky, and on —, 189—, a horse, owned by plaintiff, of the value of — dollars, strayed on the track of defendant, in said county, and defendant, by its agents and servants, so carelessly and negligently managed and operated its engine and cars that the same ran over and killed said horse, to plaintiff's damage in the sum of — dollars.

[Plaintiff states that on —, 189—, after having first notified in writing — the nearest station agent of defendant to the place where said horse was killed, of his intention so to do, he applied to —, a justice of the peace for — county, residing in the magisterial district in which said horse was killed, to appoint, and said justice did appoint, three disinterested and discreet housekeepers of — county, who, after being duly sworn, examined said horse and fixed its value at — dollars, full particulars of which are set out in a report made by said appraisers, returned to said justice, and now part of the records of his office. A copy of said report is filed as part hereof, marked "A." Defendant has failed to pay the amount so assessed by said appraisers.]

Wherefore plaintiff prays judgment for — dollars [and twenty-five per cent damages thereon] and all proper relief.
J. R., Atty. for Plff.

Breach of Contract.

[See note 13, page 69, and note 52, page 72; and note requirement as to allegation of performance of precedent condition.]

John Smith, Plaintiff, }
vs. } Petition. — CIRCUIT COURT.
James Jones, Defendant. }

The plaintiff, John Smith, states that on — 189—, he and the defendant, James Jones, entered into a contract whereby defendant agreed to deliver to plaintiff, at the railroad depot in —, — county, Kentucky, on or before —, 189—, — bushels of corn, for which the plaintiff was to pay to defendant, as delivered, — cents per bushel; that corn was worth at said place on —, 189—, — cents per bushel. He states that defendant has broken his contract, in that he failed to deliver at said depot any part of said corn, and because of defendant's breach of contract, as aforesaid, plaintiff has been damaged in the sum of — dollars.

Wherefore he prays judgment for — dollars and all proper relief.
J. R., Atty. for Plff.

Warranty.

[See 90 Ky. 473; 87 Ky. 160.]

John Smith, Plaintiff, }
vs. } Petition. — CIRCUIT COURT.
James John, Defendant. }

The plaintiff, John Smith, states that on —, 189—, the defendant, James Jones, sold and delivered to plaintiff, for the price of — dollars, which plaintiff then paid to defendant, a bay horse, which he then and there warranted to be sound in every respect, when, in fact, said horse was then, and is now, unsound and afflicted with a disease known as spavin, whereby plaintiff has sustained damages in the sum of — dollars.

Wherefore plaintiff prays judgment for — dollars and all proper relief.
J. R., Atty. for Plff.

Fraud or Deceit.

[See 4 Dana 300; 1 Dana 30; 1 Dana 273.]

John Smith, Plaintiff, }
vs. } Petition. — CIRCUIT COURT.
James Jones, Defendant. }

The plaintiff, John Smith, states that on —, 189—, the defendant, James Jones, offering to sell him a horse, fraudulently represented him to be a kind, gentle buggy horse, and plaintiff, relying on said representation, bought said horse, and paid defendant therefor two hundred dollars; that at the time of said purchase the horse was, as defendant well knew, wild and unmanageable, and would not and will not work in a buggy, by reason whereof he is worthless to plaintiff, and he has been damaged in the sum of — dollars.

Wherefore plaintiff prays judgment for — dollars and all proper relief.
J. R., Atty. for Plff.

Assignee against Assignor.

[See Ky. Stat., secs. 474, 475, and notes thereto, and note 5, page 69, of Code.]

John Smith, Plaintiff, }
 ^{vs.} } Petition.
 James Jones, Defendant. } — CIRCUIT COURT.

The plaintiff, John Smith, states that on the — of — 189—, the defendant, James Jones, by his written indorsement on the back thereof, assigned to him a promissory note for — dollars, executed to defendant by one Henry Williams, that he paid to defendant for said note on the day of its assignment, the sum of — dollars. That he instituted suit on said note against said Williams on the — of — 189— in the — court and obtained judgment against him, and in due time an execution issued on said judgment directed to the — of — said county, that being the county of Williams' residence, and said execution was on the — of —, 189—, returned by said officer to the office from whence it issued indorsed "no property found to make this execution or any part thereof." Copies of said note, judgment and execution are filed as part hereof, marked "A." He says that defendant, although requested so to do, has failed and refused to pay to him any part of the amount he paid for the assignment of said note, and that he is entitled to recover from defendant the amount he paid for said note, with interest thereon from the date of payment.

Wherefore he prays judgment against defendant for — dollars, with interest thereon from the — of —, 189—, until paid, and for all proper relief.

J. R., Atty. for Plff.

Attachment bond, on.

[See sec. 198 of Code and notes thereto, and notes 9-11, page 69.]

John Jones, Plaintiff, }
 ^{vs.} } Petition.
 Henry Smith and Joseph Chandler, Defendants. } — CIRCUIT COURT.

The plaintiff, John Jones, states that one Henry Sanders, in an action instituted by him on the — of —, 189—, against this plaintiff in the — circuit court, desiring to obtain an attachment against his property, procured the defendants, Henry Smith and Joseph Chandler, to execute, and they did execute before the clerk of said court, an attachment bond, conditioned that the said Sanders would pay to plaintiff the damages not exceeding — dollars, which he might sustain if the attachment was wrongfully obtained. A copy of said bond, which was approved by the said clerk, is filed as part hereof, marked "A."

Plaintiff states that upon the execution of said bond the said clerk issued an attachment against the property of this plaintiff, and said attachment was, on the — of —, 189—, levied by the officer having it to execute upon the following described property then owned by this plaintiff [here describe property], which was taken possession of by said officer and retained by him until the — of —, 189— [or, if it was sold under sec. 218, state facts].

He says that he employed an attorney to contest said attachment and agreed to pay him for his services the sum of — dollars, which was a reasonable fee; that he was deprived of the use and possession of said property for — days and thereby suffered — dollars damage; that he expended in contesting said attachment the following amounts [here state items and amounts], and was obliged to and did leave his business and spend — days in preparing his case and in attendance upon court contesting said attachment; that his services were reasonably worth during said time — dollars per day; that he recovered as costs in the issue growing out of the attachment the sum of — dollars. He states that on the — of —, 189—, the

court in which said action was pending, upon a trial thereof, rendered a final judgment discharging said attachment, and said judgment is now in force. He files as part hereof a copy of said judgment, marked "B."

Plaintiff states that by reason of the wrongful issual of said attachment he was damaged as aforesaid in the sum of — dollars, and that the defendants have broken the conditions of their bond in this, that they have failed to pay to him said damages or any part thereof.

Wherefore plaintiff prays judgment against defendants for — dollars for costs and all proper relief.

J. R., Atty. for Plff.

[Although not necessary the plaintiff in the attachment suit frequently signs the bond; in such cases the plaintiff in an action on the bond may or may not include him as defendant; if he is made defendant the above form can be changed to conform to the facts.]

Indemnifying Bond, on.

[See secs. 641, 643 of Code and notes thereto, and notes 9-11, page 69.]

John Smith, Plaintiff,

vs.

Henry James and Robert Sewell,
Defendants.

} Petition.

— CIRCUIT COURT.

The plaintiff, John Smith, states that an execution issued upon a judgment rendered in the — court in favor of John Jones, and against William Martin, and that said execution has placed in the hands of —, sheriff [or constable] of — county, to do execution thereof, that said sheriff [or constable] after levying [or before, as the case may be] said execution upon the following property [here describe property] and before proceeding further under said execution demanded of the said John Jones a bond of indemnity, and thereupon the defendants, Henry James and Robert Sewell, as sureties for Jones [or — Jones with said James and Sewell as sureties] executed a bond of indemnity to said officer conditioned among other things that the said obligors would pay to any claimant of said property the damages he might sustain in consequence of the seizure or sale of said property. Said bond was approved by said officer and returned by him with the said execution to the proper office, and copies of the execution and bond are filed as part hereof, marked "A."

Plaintiff states that upon the execution of said bond the officer proceeded to and did sell said property, and plaintiff has been since and is now deprived of the possession thereof. He states that when said property was seized and sold he was the owner thereof, and its reasonable value at said time was — dollars, and he has been damaged in that sum by the seizure and sale of said property. He says that the defendants have broken the conditions of their bond in this, that they have failed to pay said damages or any part thereof. Wherefore plaintiff prays judgment against defendants for — dollars for his costs and all proper relief.

J. R., Atty. for Plff.

Guardian's Bond.

[See Ky. Stat., sec. 2017, and notes thereto; Code, sec. 67, and notes 9-11, page 69.]

William Hiatt, Plaintiff,

vs.

Abram Jones, and David Adams, Defendants.

} Petition.

— CIRCUIT COURT.

The plaintiff, William Hiatt, states that on the — of —, 189—, he was an infant under the age of twenty-one years and a resident of — county, Kentucky, and

that on said day the defendant, Abram Jones, was duly appointed as his guardian by the county court of said county, and thereupon qualified as such guardian, and executed in and before the judge of said court a bond with defendant, David Adams, as his surety, conditioned that the said Jones would faithfully discharge the trust of guardian; said bond was approved by the said judge, and is now of record in the clerk's office of said court, and a copy thereof, together with the order appointing defendant as guardian, is filed as part hereof, marked "A."

Plaintiff states that upon the execution of said bond there came into the possession of said guardian, the sum of — dollars [or if other property state it], the property of this plaintiff, and defendant has since said time and now holds said money [or property].

He says that on the — of — he became twenty-one years of age and demanded a settlement with his guardian and the payment of the amount due to him, but he says that defendant has broken the conditions of his bond in this, that he has failed and refused to pay to plaintiff any part of the amount due him [except—if any part has been paid here state it]. He says he is entitled to recover interest on said amount at biennial rests from the time it came into his guardian's hands until his arrival at age, and to legal interest on the amount then due from that time until paid.

Wherefore he prays judgment against defendant for — dollars, with interest computed at biennial rests from the — of —, 189—, until the — of —, 189—, and with legal interest from that date until paid, and for his costs and all proper relief.

J. R., Atty. for Plff.

Negligence of Common Carrier.

[See, as to venue of action, Code, sec. 73, and notes, and note 34 to sec. 90, and Ky. Stat., sec. 6.]

James Kane, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, Defendant.

— CIRCUIT COURT.

} Petition.

The plaintiff states that the defendant is a corporation created by the laws of Kentucky and authorized to sue and be sued by its corporate name, "The Louisville & Nashville Railroad Company;" that it was on the — of —, 189—, engaged in operating and managing a line of railroad running from Lexington, Ky., to Louisville, Ky., and through the county of —, and in transporting for hire on said road passengers and freight. That he resides in [or was injured in — county].

He says that on said day and while he was riding as a passenger on the passenger train of defendant going east, he was injured [here state character of injuries] and said injuries were caused by the negligence and carelessness of defendant, its agents and servants, in so negligently and carelessly operating and managing said train, that it ran into or over [state nature of accident causing injury], thereby injuring plaintiff as aforesaid to his damage in the sum of — dollars.

[If plaintiff was an employe of defendant, the above form will answer, being changed to suit the facts, and it should be averred that the injury was caused by the gross negligence and carelessness of the defendant, its agents and servants.]

[If plaintiff is the administrator of a person who was killed by the negligence or carelessness of the defendant, the above form can be changed to suit the facts.]

Wherefore plaintiff prays judgment against defendant for — dollars and all proper relief.

J. R., Atty. for Plff.

New Promise.

[See Ky. Stat., sec. 2514, and notes thereto, and notes 26, 37, page 71.]

John Jones, Plaintiff,
vs.
 James Williams, Defendant. } Petition. — CIRCUIT COURT.

The plaintiff, James Jones, states that in the year 1885 he sold and delivered to the defendant, at his request [here state character of property], of the value of — dollars; he files as part hereof an account showing the time when said — were so furnished and delivered and the character thereof and prices charged therefor, and says that said prices are reasonable, and defendant was to pay for them in — days from their delivery [or he sold them to defendant upon his promise to pay therefor upon delivery (or if at a specified time state it) the prices charged therefor in the said account].

Said account has been due since the — of —, 189—, and no part of it has been paid, and plaintiff is entitled to interest on said account from the time when it became due.

He says that on the — of —, 189—, defendant promised to pay said account, but has failed to do so.

Wherefore he prays judgment against defendant for — dollars, with interest from the — of —, 189—, until paid, for costs and all proper relief.

J. R., Atty. for Plff.

New Promise on Written Obligation.

[See Ky. Stat., sec. 2514, and notes thereto.]

James Jones, Plaintiff,
vs.
 John Williams, Defendant. } Petition. — CIRCUIT COURT.

The plaintiff, James Jones, states that the defendant, John Williams, by his promissory note [or if other written obligation here describe it] dated —, 189—, and executed and delivered to plaintiff, agreed to pay him — months after said date the sum of — dollars, with interest thereon from — until paid. Said note is filed as part hereof, marked "A," and is due and unpaid. Plaintiff states that on the — of — 189—, defendant promised to pay the said note [or paid — dollars thereon, which is indorsed as a credit on the back of said note, or acknowledged that said note was just and due], but has failed to pay any part thereof.

Wherefore plaintiff prays judgment for — dollars, with interest from — until paid, and for all proper relief.

J. R., Atty. for Plff.

Bill of Exchange.

[See Ky. Stat., sec. 483, and notes thereto; and 7 Bush 474; 1 Bush 129.]

Bank of Newcastle, Plaintiff,
vs.
 James Giles, Henry Smith and
 John Jones, Defendants. } Petition. — CIRCUIT COURT.

The plaintiff, the Bank of Newcastle, states that it is a corporation created under the laws of Kentucky [or if the bank is a national bank state that it was organized under and in accordance with the provisions of the national banking law of the United States] and authorized to purchase and discount bills and notes, contract and be contracted with, sue and be sued by its corporate name "The Bank of Newcastle."

That on the — of — 189—, the defendant, James Giles, executed and delivered to the defendant, Henry Smith, his promissory note for — dollars, whereby he agreed to pay him said amount four months after said date with interest thereon from — until paid; said note was made payable and negotiable at the [here state name of State or national bank in this State at which note was made payable and negotiable] and after being indorsed by the defendant, John Jones, it was before maturity discounted by the said Jones to plaintiff, who is now the owner thereof.

Plaintiff states that on the day said note fell due it was presented during regular banking hours at the counter of the bank at which it was payable, and payment thereof demanded and refused, and on said day said note was duly protested for non-payment by —, notary public, and notices of the protest were on said day delivered by said notary (or sent to the address of each of them in the mail by him) to each of the defendants, and each of the defendants received due notice of the non-payment of said note. The protest and copies of the notices are filed as part hereof, marked "A." Plaintiff says no part of said note has been paid. Wherefore it prays judgment against defendants for — dollars, with interest from — until paid; for — dollars, notary fees, and all proper relief —.

J. R., Atty. for Plff.

Insurance Policy.

[See Code, sec. 71; and note 52, sec. 90, as to necessity for averring compliance with all precedent conditions upon which liability of company depends.]

William Smith, Plaintiff,

vs.

The — Insurance Company, Defendant.

} Petition.

— CIRCUIT COURT.

The plaintiff, William Smith, states that the defendant, the — Insurance Company, is a corporation created by the laws of [here give State under laws of which company was organized], and authorized to sue and be sued, and do a general fire insurance business under its corporate name aforesaid.

He states that on the — of —, 189—, in consideration of — dollars paid to it by plaintiff, it issued and delivered to him a policy of insurance on the [here describe property], whereby it agreed to insure said property against all loss or damage by fire from the — of —, 189—, to the — of —, 189—, to the amount of — dollars, and to pay to plaintiff any loss or damage that he might sustain between said dates by injury or destruction of said property by fire. Plaintiff states that on the — of —, 189—, said property was totally [or if partially state the facts] destroyed by fire; that at said time plaintiff was the sole owner of said property [or if any other person owned an interest state facts, and state facts as to any other insurance on property]; that within — days after said fire he prepared and delivered to defendant proof of the loss of said property, as directed and required by the contract of insurance, and said proofs were accepted by the defendant [or if returned say so]. He states that he has [here state specifically and separately the performance of each condition in the policy upon which the liability of the defendant depends]. Plaintiff states that defendant has broken the conditions of its contract in this, that it has failed and refused to pay to plaintiff the amount of said insurance, or any part thereof, although the same has been due since the — day of —, 189—, and plaintiff is entitled to interest from that date. Wherefore plaintiff prays judgment against defendant for — dollars, with interest from the — day of —, 189—, until paid, for costs and all proper relief.

J. R., Atty. for Plff.

Divorce.

[See secs. 76, 420 of Code and notes; and Ky. Stat., secs. 2117-2126.]

John Smith, Plaintiff, } — CIRCUIT COURT.
 vs.
 Mary Smith, Defendant. } Petition in Equity,

The plaintiff, John Smith, states that he and the defendant, Mary Smith, were married in this State in the year 189—, and they each now reside and have continuously resided in — county, in this State, for more than one year next before the commencement of this action; that the cause of divorce, hereinafter set out, occurred in this State, and within five years next before the commencement of this action.

He states that he and the defendant lived together as man and wife from their marriage until —, 189—, at which time defendant, without any fault or like fault on his part, abandoned his home, and refuses to and has not since said time lived with him [or state any other grounds for divorce]; that during the time they lived together he always treated defendant in a kind and affectionate manner and provided comfortably for her support.

Wherefore he prays a divorce from the bonds of matrimony.

J. R., Atty. for Plff.

Divorce from Bed and Board.

[See Ky. Stat., sec. 2121, and notes thereto, and secs. 76 and 420 of the Code and notes.]

Mattie Davis, Plaintiff, } — CIRCUIT COURT.
 vs.
 William Davis, Defendant. } Petition.

The plaintiff, Mattie Davis, states that she and the defendant, William Davis, were lawfully married on the — of —, 189—; that they each now reside, and have for more than one year last past resided continuously, in the State of Kentucky; that she is now an actual resident of — county [county where suit is instituted]; that the cause of divorce, hereinafter set out, occurred and existed in this State, and within five years next before the commencement of this action; that she and defendant lived together as man and wife from the time of their marriage as aforesaid until the — of —, 189—, when the defendant, without any fault or like fault on the part of this plaintiff [here state conduct complained of]. That on account of defendant's said conduct she was compelled to and did leave him [or he abandoned her, as the case may be], and since said time defendant has made no provision for her support [or the support of their children—if any, name them and give their ages]; that she has no income, and no estate or means of maintaining herself [and her children who are in her custody]; that defendant is possessed of ample estate.

Wherefore she prays for a divorce from bed and board [and that she be awarded the custody of said children], for maintenance for herself and children pending this action, for alimony and all proper relief.

J. R., Atty. for Plff.

Alimony.

[See sec. 424, and notes thereto, and sec. 76.]

Mattie Davis, Plaintiff, } — CIRCUIT COURT.
 vs.
 William Davis, Defendant. } Petition in Equity.

The plaintiff, Mattie Davis, states that she is an actual resident of — county, Kentucky, that on the — of —, 189—, she and the defendant were lawfully married and lived together as man and wife from that time until the — of —, 189—,

when the defendant, without any fault upon the part of plaintiff or any cause for so doing, abandoned her and has since refused to live with or make any provision for her support. She states that the defendant is possessed of ample means and that she has no estate or income.

Wherefore she prays that alimony be allowed her, and for maintenance pending this action.

J. R., Atty. for Plff.

Upon Return of "No Property."

[See secs. 70, 439, and notes thereto.]

John Smith, Plaintiff,
vs.
James Jones, Defendant.

} Petition in Equity.

— CIRCUIT COURT.

The plaintiff, John Smith, states that in —, 189—, he recovered a judgment in the circuit court for — county against the defendant, James Jones, for — dollars, with — per cent interest thereon from —, 189—, and — dollars costs: that on —, 189—, he had issued from the clerk's office of said court an execution on said judgment for the amount thereof; said execution was directed to the sheriff of — county, made returnable on —, 189—, and on —, 189—, was placed in the hands of —, then sheriff of — county, to do execution thereof. On —, 189—, said sheriff returned said execution to the office from whence it issued, indorsed, "No property found, —, S. — C." A copy of said execution and officer's return is filed as part hereof. No part of said judgment has been paid.

Wherefore plaintiff prays for a general order of attachment against defendant's property; that defendant be required to answer and discover any money, choses in action, legal or equitable interests, or other property owned by or in which he has any interest, and that so much of any property discovered by defendant as may be necessary be subjected to the payment of plaintiff's judgment and costs of this action; he prays for all proper relief.

J. R., Atty. for Plff.

Mortgage Lien—To Enforce.

[See secs. 692, 694, and notes thereto.]

John Smith, Plaintiff,
vs.
James Jones and Mary Jones, Defendants.

} — CIRCUIT COURT.
Petition in Equity.

The plaintiff, John Smith, states that the defendant, James Jones, by his promissory note, dated —, 189—, and executed and delivered to plaintiff, agreed to pay him one year thereafter — dollars, with — per cent interest thereon from — until paid. No part of said note has been paid. He states that at the time said note was executed, and to secure its payment, the defendant and his wife defendant, Mary Jones, executed to him a mortgage on a tract of land, in — county, Kentucky, on the waters of Drennon creek, bounded as follows: Beginning at a stone, thence east one hundred poles, thence south one hundred poles, thence west one hundred poles, thence north one hundred poles to the beginning, containing sixty-three acres. Said mortgage was duly signed and acknowledged by defendants, recorded in the proper office, and a copy thereof, together with said note, is filed as part hereof. Plaintiff states that he has, by virtue of said mortgage, a lien on said land to secure the payment of said note; that there are no other liens on it known to him [if there are other liens on property, state the facts and make holders of liens parties defendant], and it can not be divided without materially impairing its value [or if it can be divided without impairing its value, state the fact].

Wherefore plaintiff prays judgment against defendant, James Jones, for his

debt, interest and costs, that said land be sold [or, if it is susceptible of division, a sufficiency thereof to satisfy his debt], and a sufficiency of the proceeds of the sale to satisfy said judgment be applied to that purpose, and for all proper relief.

J. R., Atty. for Plff.

Decedent's Estate—To Settle.

[See secs. 65, and 428 to 438, and notes thereto.]

John Smith, Administrator of James Jones, Plaintiff,	} — CIRCUIT COURT. Petition in Equity.
vs.	
Mary Jones, Wm. Jones, Richard Thomas and Harvey Black, Defendants.	

The plaintiff, John Smith, states that on —, 189—, James Jones, then a resident of — county, Kentucky, died intestate, and plaintiff was appointed administrator of his estate by the — County Court of said county, at its — term, 189—, and thereupon qualified, and is now acting as such administrator. Copies of the orders of said court showing his appointment and qualification are filed as part hereof, marked "A." He states that said decedent left surviving him as his only heirs at law the defendants. Mary Jones, his widow, and Wm. Jones, his only child, who is under fourteen years of age. The decedent owed, at his death, debts amounting to one thousand dollars, all now due and unpaid, and left no personal estate, except what was set apart to his widow by the appraisers of his estate [or if he left more state what disposition was made of it]. A copy of the inventory and allotment to the widow is filed as part hereof, marked "B." The defendants, Richard Thomas and Harvey Black, are the only creditors of the decedent known to plaintiff, and have claims against his estate amounting to one thousand dollars. Decedent died seized in fee-simple of a tract of land in — county, Kentucky, bounded as follows: Beginning at a stone corner to Davis, thence east one hundred poles, thence south one hundred poles, thence west one hundred poles, thence north one hundred poles, containing sixty-three acres. The deed conveying said land to decedent is filed as part hereof, marked "C." He owned no other real property known to plaintiff; this land is worth about two thousand dollars, and it will be necessary to sell a sufficiency of it to pay the debts of decedent, the funeral expenses and costs of administration. [If the defendant, Mary Jones, is entitled to a homestead in said land, state facts.]

Wherefore plaintiff prays that this action be referred to the commissioner to ascertain and report the amount of debts against the estate, and to settle plaintiff's accounts as administrator and make proper allowance to the administrator and his attorney, and that a sufficiency of said land, after setting apart a homestead [if homestead is to be allotted], be sold to pay the debts of decedent and costs. He prays for all proper relief.

J. R., Atty. for Plff.

Fraudulent Conveyance—To Set Aside.

[See Ky. Stat., secs. 1906, 1907, and notes thereto; 80 Ky. 600; 80 Ky. 212; 79 Ky. 241.]

John Smith, Plaintiff,	} — CIRCUIT COURT. Petition in Equity.
vs.	
James Jones and Henry Allen, Defendants.	

The plaintiff, John Smith, states that in —, 189—, he recovered a judgment in the circuit court for — county against the defendant, James Jones, for —

dollars, with — per cent interest thereon from —, 189, and — dollars costs; that on —, 189—, he had issued from the clerk's office of said court an execution on said judgment for the amount thereof. Said execution was directed to the sheriff of — county, made returnable on —, 189—, and on —, 189—, was placed in the hands of —, then sheriff of — county, to do execution thereof, and was by him returned on —1, 189—, to the office from whence it issued, indorsed, "no property found, —, S. — C." A copy of said execution and officer's return is filed as part hereof, marked "A." No part of said judgment is paid.

Plaintiff states that by deed, dated —, 189—, the defendant, Jones, for the pretended consideration of one thousand dollars, conveyed to his co-defendant, Henry Allen, a tract of land in — county, Kentucky, on the waters of Drennon creek, and bounded as follows: Beginning at a stone, thence east one hundred poles, thence south one hundred poles, thence west one hundred poles, thence north one hundred poles to the beginning, containing sixty-three acres. Said deed is on record in the proper office, and a copy is filed as part hereof, marked "A." Plaintiff states that said conveyance was made without valuable consideration, and for the purpose of cheating and defrauding the creditors of said Jones and this plaintiff, and there are no liens [if there are other liens on land, state facts and make holders of liens parties defendant] on said land known to this plaintiff, and it can not be [or can be, as the case may be] divided without impairing its value.

Wherefore plaintiff prays that said conveyance be canceled and held for naught, and that said land [or if it is divisible—so much as may be necessary] be sold, and so much of the proceeds thereof as may be necessary for that purpose be applied to the payment of his judgment and costs of this action, and for all proper relief.

J. R., Atty. for Plff.

To Sell Land to Pay Lien Notes.

[See secs. 692-694, and notes thereto.]

John Smith, Plaintiff,

vs.

James Jones and Henry Allen, Defendants.

} — Circuit Court.
} Petition in Equity.

The plaintiff, John Smith, states that on —, 189—, he sold and by deed, which was accepted and is now on record in the proper office, conveyed to the defendant, James Jones, a tract of land in — county, Kentucky, on Flag creek, and bounded as follows: Beginning at a stone corner, thence east one hundred poles, thence south one hundred poles, thence west one hundred poles, thence north one hundred poles, containing sixty-three acres. In consideration for said land defendant, on —, 189—, executed and delivered to plaintiff two notes, whereby he agreed to pay him — dollars on —, 189—, and — dollars on —, 189—, with six per cent interest thereon from —, 189—. A lien is retained in the said deed to secure the payment of these notes. The note due —, 189—, plaintiff assigned to defendant, Henry Allen, who now holds it. The other note, no part of which has been paid, is held by plaintiff, and, together with a certified copy of the said deed, is filed as part hereof. There are no other liens on said land known to plaintiff, except those herein mentioned [or if there are other liens state them, and make persons holding them defendants], and said land can be divided without materially impairing its value [or can not be divided without materially impairing its value, as the case may be].

Wherefore plaintiff prays judgment against defendant, James Jones, for his debt, interest and costs; that defendant Allen be required to set up his lien, and that so much of said land [or if it is not susceptible of division, ask that whole of it be sold], as may be necessary for that purpose be sold to satisfy said lien, debts, and for all proper relief.

J. R., Atty. for Plff.

To Set Aside Sale Made to Prefer a Creditor.

[See Ky. Stat., secs. 1910-1917, and notes thereto.]

John Smith, Plaintiff,	}	— CIRCUIT COURT. Petition in Equity.
vs. James Jones and Henry Allen, Defendants.		

The plaintiff, John Smith, states that the defendant, James Jones, by his promissory note, dated —, 189—, and executed and delivered to plaintiff, agreed to pay him, six months thereafter, — dollars, with six per cent interest thereon from date. Said note is filed as part hereof. No part of said debt has been paid. He states that defendant Jones is indebted to other persons in a large amount, and that in contemplation of insolvency, and designing to prefer defendant Henry Allen to the exclusion of his other creditors, defendant, when he did not have sufficient property to pay his debts, did, on —, 189—, and within six months next before the institution of this action, sell and deliver to said Allen [here describe property] of the value of — dollars, to satisfy a debt due by said Jones to said Allen, and created long before —, 189—.

Wherefore plaintiff prays that said sale be adjudged to operate as an assignment of all the property of defendant Jones for the payment *pro rata* of his debts, and that such orders be made as may be necessary to protect this plaintiff and the other creditors of defendant, and for all other proper relief. J. R., Atty. for Plff.

Division of Land.

[See sec. 499 of Code, and notes thereto.]

Wm. Walker, Plaintiff,	}	— CIRCUIT COURT. Petition in Equity.
vs. Sam Walker and Tom Walker, Defendants.		

The plaintiff, Wm. Walker, states that he and the defendants, Sam Walker and Tom Walker, own each an undivided [here state interest owned by each] interest in a tract of land in — county, bounded and described as follows [here insert boundary], and containing — acres. They received said land by [here state person from whom land was received and how plaintiff and defendants became the owners of it]. He files as part hereof, marked "A," copies of the evidences of the title to said land. He says that no other persons own any interest in said land, and that he and the defendants are each entitled to an undivided [state interest of each] thereof.

[If the land is subject to dower and it is desired to allot the dower as well as divide the remainder of the land, the petition should state facts, and the owner of dower interest should be a party plaintiff or defendant, and the petition should aver that after setting apart dower interest the other parties are entitled to the remainder, according to their respective interests.]

Wherefore plaintiff prays that commissioners be appointed to divide said land between plaintiff and defendant, allotting to each [here state interest each is entitled to], according to quantity, quality and value [if dower is to be allotted the prayer of the petition should be changed to conform to the facts and should ask that one-third of the land, including the mansion house and the out-buildings, be set apart to the widow, and the remainder divided between the other parties according to their interests, stating them]. He prays that the costs of division be apportioned between the parties hereto in proportion to their respective interests, and for all proper relief. J. R., Atty. for Plff.

SALE OF REAL ESTATE OF PERSONS UNDER DISABILITY.

Guardian against Ward for Maintenance and Education.

[See Code, secs. 489, 492, and notes. As to service of summons, see sec. 52; as to appointment of guardian *ad litem*, see sec. 38; and depositions should be taken showing necessity for sale.]

James Shuck, guardian of Mattie
Shuck, Plaintiff,

vs.

Mattie Shuck, Defendant.

— CIRCUIT COURT.

} Petition in Equity.

The plaintiff, James Shuck, states that on the — of —, 189—, he was, by an order of the county court of — county, appointed as guardian for the defendant, Mattie Shuck, and thereupon qualified and is now acting as such guardian. He files as part hereof, marked "A," the orders of said court showing his appointment and qualification. He says that his ward is — years of age and unable, on account of her youth [or bad health, or physical condition, or mental condition, as the case may be], to perform any kind of labor or earn a living, in whole or in part; that his ward has no income except as hereinafter stated, and owns no estate of any kind, present or contingent, in reversion or remainder, except the following described real property situated in the county of [here describe it]; that his ward received said property from [here state from whom and how ward became owner of property], and he files as part hereof copies of the evidences of the title to said property, marked "A."

He states that the income derived annually from said property is only — dollars, and is totally inadequate to maintain or educate his ward, and it is necessary for her education and maintenance that said property be sold and the proceeds applied thereto.

Wherefore plaintiff prays that the court order a sale of said land for the purposes herein set out, and for all proper relief.

J. R., Att'y. for Plff.

Sale to Pay Debts of Ancestor.

[See Code, sec. 489, and notes, and note 12 to sec. 437, and Ky. Stat., secs. 2084-2089 and notes; as to service of summons, see sec. 52; as to appointment of guardian *ad litem*, see sec. 38.]

James Jones, Plaintiff,

vs.

Fannie Sams and James Sams, Defendants..

— CIRCUIT COURT.

} Petition in Equity.

The plaintiff, James Jones, states that on the — of —, 189—, Richard Sams, the father of defendants, Fannie Sams and James Sams, by his promissory note [or if the indebtedness arose in any other way state facts] executed and delivered to him, agreed to pay him — months after said date the sum of — dollars with interest thereon from — until paid; said note is filed as part hereof, marked "A," and is due and unpaid.

He states that said Sams died intestate [or if he died testate state fact], and left surviving him as his only heirs at law the defendants, Fannie Sams and James Sams, his children; that no administration was ever granted or applied for on his estate [or if administration was granted, or decedent died testate and an executor was appointed state the facts, showing why debt was not paid by him, and make the

personal representative a party defendant to action]; that he left no property [or if he left property state in a general way how it was disposed of], except a tract of land [here describe it] which descended to his children, these defendants, who are now in possession thereof; that said land is worth — dollars; that there are no liens on it known to plaintiff [if other liens state them, and make holders parties defendant] and it can be divided [or can not, as the case may be] without impairing its value; that the defendant Fannie is — years old and the defendant James is — years old, and neither of them has any guardian, curator or committee known to plaintiff [or if they have either state fact and make him a party defendant].

Wherefore plaintiff prays that so much of said property [or all of it if it is not susceptible of division] as may be necessary be subjected to the payment of his debt and for all proper relief.

J. R., Atty. for Plff.

Reinvestment for.

[See Code, sec. 480, 492, 493, and notes. As to service of summons on infant, see sec. 52; as to appointment of guardian *ad litem*, see sec. 38; and depositions should be taken to show that ward would be benefited by sale and reinvestment.]

James Jones, guardian of Silas Corbin, Plaintiff,	} — CIRCUIT COURT. Petition in Equity.
<i>vs.</i> Silas Corbin, Defendant.	

The plaintiff, James Jones, states that on the — of —, 189—, he was by an order of the county court of — county, appointed as guardian for the defendant, Silas Corbin, and thereupon qualified and is now acting as such guardian; he files as part hereof, marked "A," copies of the orders of said court, showing his appointment and qualification. He says that his ward is the owner of the following described real property [here describe it]; that said property is [here state fully the facts showing why said property is not a good investment and how the ward will be benefited by a sale of it], and the interest of his ward would be benefited by a sale of said property and the investment of the proceeds in other property that would realize an income [if it is a fact it may be alleged that the income is necessary to maintain or educate the ward]. He says his ward received said property [here insert how ward became owner of property] and he files as part hereof copies of the evidences of his ward's title thereto.

Wherefore he prays that the court decree a sale of said property for reinvestment under the direction of the court. He prays for all proper relief.

J. R., Atty. for Plff.

Sale of Indivisible Property of Joint Owners.

[See Code, sec. 490, and notes. If this action is brought by an adult against an infant, the infant must be summoned as provided in sec. 52, and a guardian *ad litem* appointed as provided in sec. 38, and depositions must be taken to prove allegations of petition, but if infant has a guardian and he answers admitting petition it will be sufficient without this.]

William Webb, Plaintiff, by his Guardian, Silas Webb,	} — CIRCUIT COURT. Petition in Equity.
<i>vs.</i> John Webb, Defendant.	

The plaintiff, William Webb, states that he is an infant, under the age of twenty-one years, and that Silas Webb was, on the — of —, 189—, by an order of the county court of — county, appointed his guardian, and thereupon qualified and is now acting as such guardian. Copies of the order of said court are filed herewith. He

says that he and the defendant, John Webb, each own an undivided one-half of a tract of land [or other real property] in — county, Kentucky, bounded and described as follows [here describe it]; that said land is in the possession of plaintiff and defendant. They received said land from [here state manner in which property was received] and he files as part hereof copies of the title papers to said land marked "A." He says that said property can not be divided without materially impairing the value of plaintiff's interest therein.

Wherefore he prays that the court decree a sale of said property and for all proper relief.

J. R., Atty. for Plff.

DEMURRERS.

General Demurrer to Petition.

[See sec. 93, and notes.]

John Smith, Plaintiff,
vs.
James Jones, Defendant.

} Demurrer.

— CIRCUIT COURT.

The defendant demurs to the petition, because it does not state facts sufficient to constitute a cause of action.

J. R., Atty. for Dft.

General Demurrer to One Paragraph of Petition.

[See sec. 113-1.]

John Smith, Plaintiff,
vs.
James Jones, Defendant.

} Demurrer.

— CIRCUIT COURT.

The defendant demurs to the second paragraph of the petition, because it does not state facts sufficient to support a cause of action.

J. R., Atty. for Dft.

General Demurrer to Answer.

[See sec. 93, and notes.]

John Smith, Plaintiff,
vs.
James Jones, Defendant.

} Demurrer.

— CIRCUIT COURT.

The plaintiff demurs to the answer, because it does not state facts sufficient to constitute a defense.

J. R., Atty. for Plff.

Special Demurrer.

[See sec. 92, and notes.]

John Smith, Plaintiff,
vs.
James Jones, Defendant.

} Special Demurrer.

— CIRCUIT COURT.

The defendant demurs specially to the petition, because this court has no jurisdiction of the subject of action.

J. R., Atty. for Plff.

ANSWERS, COUNTER-CLAIMS, SET-OFFS.

[As to verification of, see secs. 116, 117; forms of, page 627.]

Plea of Payment.

[This plea should be replied to.]

John Smith, Plaintiff, }
vs. } Answer. — CIRCUIT COURT.
 James Jones, Defendant. }

The defendant states that on —, 189—, he paid to plaintiff the full amount of the debt and interest mentioned in petition.

R. R., Atty. for Dft.

Answer and Set-Off.

[See sec. 96-2.]

John Smith, Plaintiff, }
vs. } Answer and Set-off. — CIRCUIT COURT.
 James Jones, Defendant. }

The defendant states that the plaintiff is indebted to him in the sum of two hundred dollars for money lent and furnished by defendant to plaintiff on —, 189—, upon the promise of plaintiff to repay said amount in six months, with six per cent interest thereon from — 189—. He has failed to pay any part thereof.

Wherefore defendant prays that his demand be set off against the debt sued on and for judgment over against plaintiff, and for all proper relief.

R. R., Atty. for Dft.

Non Est Factum.

[See notes 32, 33, page 80.]

John Smith, Plaintiff, }
vs. } Answer. — CIRCUIT COURT.
 James Jones, Defendant. }

The defendant denies that he executed or delivered the note mentioned in the petition. Wherefore he prays to be dismissed with his costs.

R. R., Atty. for Dft.

Alteration of Note.

[See 13 Bush 197; 11 Bush 69; 10 Bush 503.]

John Smith, Plaintiff, }
vs. } Answer. — CIRCUIT COURT.
 James Jones, Defendant. }

The defendant says that, after he executed to plaintiff the note mentioned in petition, it was materially altered without the consent of defendant, by erasing therein the word "one" before the word "hundred," and inserting in place thereof the word "two."

Wherefore defendant prays to be dismissed with his costs.

R. R., Atty for Dft.

Fraud.

[See note 22, page 80.]

John Smith, Plaintiff, }
vs. } Answer and Counter-claim. — CIRCUIT COURT.
 James Jones, Defendant. }

The defendant states that the note in petition mentioned was obtained from him by the fraud, covin and misrepresentation of plaintiff.

Wherefore he makes his answer a counter-claim and prays that said note be adjudged void and canceled and for all proper relief.

R. R., Atty. for Dft.

Gaming.

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant says the note sued on was given to the plaintiff for money that plaintiff won from defendant at a game of wager and chance called poker.

Wherefore he prays to be dismissed with his costs, and for all proper relief.

R. R., Atty. for Dft.

Mistake.

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant says that the note sued on was executed for a balance of one hundred dollars, due by defendant to plaintiff on an account; that it was intended by them to be for one hundred dollars, but by mistake was given for two hundred dollars; that defendant only owes on said note one hundred dollars with interest.

He prays for all proper relief.

R. R., Atty. for Dft.

No Consideration.

[See note 31, page 80.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant says the note sued on was executed without any consideration. Wherefore he prays to be dismissed with his costs.

R. R., Atty. for Dft.

Unsoundness of Mind.

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant says that when it is alleged that he executed and delivered the note sued on to plaintiff he was of unsound mind, and incapable of executing or delivering said note.

Wherefore he prays to be dismissed with his costs.

R. R., Atty. for Dft.

Illegal Consideration.

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant says that the note sued on was executed by him for one hundred gallons of whisky, sold and delivered to him in this State by plaintiff; that at the time plaintiff sold and delivered said whisky he did not have any license so to do as required by the laws of this State.

Wherefore he prays to be dismissed with his costs.

R. R., Atty. for Dft.

Usury.

[See Ky. Stat., sec. 2219, and notes thereto.]

John Smith, Plaintiff, }
vs. } Answer.
James Jones, Defendant. }

— CIRCUIT COURT.

The defendant states that on —, 189—, he borrowed from plaintiff five hundred dollars, and executed to him his note for said amount, bearing ten per cent interest from date, that he paid to plaintiff the full amount of said note and six per cent interest, that on —, 189—, he executed to plaintiff the note sued on in payment of the interest over six per cent per annum on said note, which excess plaintiff exacted from him for the loan and forbearance of said five hundred dollars. [Or if the note sued on contains in any way any usury, state fully the facts and the court will expunge it.]

Wherefore he prays to be dismissed with his costs.

R. R., Atty. for Dft.

Answer and Counter-claim for Breach of Warranty.

[See note 1, page 81, and note 27, page 83.]

John Smith, Plaintiff, } — CIRCUIT COURT.
 vs. }
 James Jones, Defendant. } Answer and Counter-claim.

The defendant says the note sued on was executed and delivered by him to plaintiff in payment of a stallion, that at the time he bought said stallion plaintiff warranted him to be a sure foal getter. He says that said stallion is now, and was when he bought him, impotent and can not and could not get any colts, and is worthless to defendant, and by reason of the impotency of said stallion, defendant has been damaged in the sum of two hundred dollars.

Wherefore he pleads said two hundred dollars as a counter-claim against the note sued on, and prays for all proper relief.

R. R., Atty. for Dft.

Plea of Payment to Plaintiff's Assignor.

[See notes 1-7, page 27.]

John Smith, Plaintiff, }
vs. } Answer.
James Jones, Defendant. }

— CIRCUIT COURT.

The defendant states that on —, 189—, and before he had any notice that plaintiff was the owner of the note sued on, he paid the full amount thereof to said Henry Allen.

Wherefore he prays to be dismissed with his costs.

R. R., Atty. for Dft.

Plea of Set-off Against Plaintiff's Assignor.

[See notes 1–7, page 27, and note 2, page 83.]

John Smith, Plaintiff, }
vs. } Answer and Set-off.
James Jones. Defendant. }

— CIRCUIT COURT.

The defendant states that on —, 189—, and before plaintiff became the owner of the note sued on, Henry Allen, the assignor thereof, by his promissory note of that date, executed and delivered to this defendant, agreed to pay him one day thereafter one hundred dollars, with interest at six per cent from date until paid.

Said note was due before note sued on was assigned to plaintiff; it is filed as part hereof, and no part of it is paid.

Wherefore defendant prays that the amount of said note and interest be set-off against note sued on, and for all proper relief.

R. R., Atty. for Dft.

General Denial.

[See notes 23-25, page 80.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant denies that he is indebted to the plaintiff in any sum for goods or merchandise; denies that in the year —, or any other time, plaintiff sold to defendant, or that he at any time bought from or agreed to pay plaintiff for any goods or merchandise. He prays to be dismissed with his costs.

R. R., Atty. for Dft.

Denial of Knowledge or Information.

[See sec. 113 and notes 13-19, page 79.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant denies that he has sufficient knowledge or information to form a belief as to whether plaintiff purchased from Sam Jones the horse in petition mentioned. Wherefore he prays to be dismissed with his costs.

R. R., Atty. for Dft.

Infancy.

[See note 27, page 80.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant says that at the time he executed and delivered the note sued on [or at the time the goods and merchandise (or other property) mentioned in the petition were sold and delivered to him] he was under twenty-one years of age.

He prays to be dismissed with his costs.

R. R., Atty. for Dft.

Limitation.

[See note 29, page 80, and Ky. Stat., sec. 2525.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant states that plaintiff's cause of action accrued more than two years before the institution of this action.

Wherefore defendant pleads and relies on the statute of limitation, in such cases made and provided, as a bar to any recovery on account of the matters set up in the petition.

R. R., Atty. for Dft.

Accord and Satisfaction.

[See note 1, page 77.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Answer.

— CIRCUIT COURT.

The defendant says that on — 189—, he sold and delivered to plaintiff a

—, and plaintiff received said —, in satisfaction of the debt mentioned in petition.

Wherefore he prays to be dismissed with his costs. R. R., Atty. for Dft.

Plea of Son Assault Demesne.

[See note 17, page 82.]

John Smith, Plaintiff,	} Answer.	— CIRCUIT COURT.
vs. James Jones, Defendant.		

The defendant states that at the time and place mentioned in the petition the plaintiff assaulted him, and that, in his necessary self-defense, he assaulted, beat and bruised plaintiff, doing him no more damage and using no more force than was necessary for said defense, and that this is the assaulting, beating and bruising complained of in petition.

He prays to be dismissed with his costs. R. R., Atty. for Dft.

Denial of Ownership.

John Smith, Plaintiff,	} Answer.	— CIRCUIT COURT.
vs. James Jones, Defendant.		

The defendant denies that on —, 189—, or at the time of the alleged trespass complained of, plaintiff was the owner, or in possession of any part of the land described in the petition.

Wherefore he prays to be dismissed with his costs. R. R., Atty. for Dft.

Plea of License.

John Smith, Plaintiff,	} Answer.	— CIRCUIT COURT.
vs. James Jones, Defendant.		

The defendant denies that he unlawfully or forcibly entered upon the land in the petition described, or any part thereof, or cut or destroyed any apple or other trees thereon, and says that on —, 189—, he entered on said land by consent of plaintiff, and by his permission cut and destroyed apple trees thereon, and these are the acts of which plaintiff complains in the petition.

R. R., Atty for Dft.

Answer Claiming Part of Land.

[See sec. 125, and notes thereto.]

John Smith, Plaintiff,	} Answer.	— CIRCUIT COURT.
vs. James Jones, Defendant.		

The defendant, James Jones, states that he holds and claims the following part of the land described in the petition, viz.: Beginning at a corner to James Adams, thence east one hundred poles, thence south one hundred poles, thence west one hundred poles, thence north one hundred poles to the beginning, containing sixty-three acres, and denies that plaintiff is the owner of, or entitled to the possession of, any part thereof. He denies that he has ever held or kept plaintiff out of possession of any part of the land mentioned in the petition, except as above stated.

Wherefore he prays to be dismissed with his costs. R. R., Atty for Dft.

Answer to Petition Claiming Specific Property.

[See sec. 181, and notes.]

John Smith, Plaintiff, }
 vs. } Answer. — CIRCUIT COURT.
 James Jones, Defendant. }

The defendant denies that plaintiff is the owner of, or entitled to the possession of, the — mentioned in the petition; denies that he has wrongfully detained said — for — days, or any length of time.

Wherefore he prays to be dismissed with his costs.

R. R., Atty. for Plff.

Answer to Petition for Breach of Warranty.

John Smith, Plaintiff, }
 vs. } Answer. — CIRCUIT COURT.
 James Jones, Defendant. }

The defendant denies that at the time, or before, plaintiff purchased the horse mentioned in the petition, he warranted said horse sound in any respect. He denies that said horse was, when he sold him, afflicted with a disease known as spavin or any disease.

Wherefore he prays to be dismissed with his costs.

B. R., Atty. for Plff.

REPLIES.

[As to verification of, see secs. 116, 117; forms of, page 627.]

To Plea of No Consideration.

John Smith, Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff denies that the note in the petition mentioned was executed without any consideration.

He prays as in his petition.

J. R., Atty. for Plff.

To Answer Charging Fraud.

John Smith, Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff denies that the note sued on was obtained from defendant by fraud, or covin, or misrepresentation.

He prays as in his petition.

J. R., Atty. for Plff.

To Answer Alleging Unsoundness of Mind.

John Smith, Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff denies that defendant, when he executed or delivered the note sued on, was of unsound mind, or incapable of executing or delivering said note.

He prays as in his petition.

J. R., Atty. for Plff.

Plea of Estoppel.

John Smith, Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff states that before he bought the note sued on that defendant requested him to buy it, saying he had no claim or defense against it, and plaintiff was thereby induced to and did buy said note, and pay therefor a valuable consideration.

Wherefore he prays as in his petition.

J. R., Atty. for Plff.

Denial of Knowledge or Information.

John Smith, Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff denies that he has any knowledge or information sufficient to form a belief as to whether on —, 189—, or at any other time, defendant paid to Henry Allen the amount of said note, or any part thereof.

He prays as in his petition.

J. R., Atty. for Plff.

To Answer Alleging Infancy.

John Smith Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff states that the goods and merchandise sold and delivered to defendant, as alleged in the petition, were necessities and suitable for his support.

He prays as in his petition.

J. R., Atty. for Plff.

To Plea of Accord and Satisfaction.

John Smith, Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff denies that the horse in the answer mentioned was sold or delivered by defendant to plaintiff, or received by him in satisfaction of any part of the debt sued on. He says that he bought from defendant said horse, and paid him therefor one hundred dollars, the price agreed upon.

Wherefore he prays as in his petition.

J. R., Atty. for Plff.

To Plea of Limitation.

John Smith, Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff states that at the time the goods and merchandise mentioned in the petition were sold and delivered to defendant both plaintiff and defendant were merchants, buying and selling goods and merchandise, and said goods were sold to defendant as a merchant.

He prays as in his petition.

J. R., Atty. for Plff.

To Plea of Son Assault Demeasne.

John Smith, Plaintiff, }
 vs. } Reply. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff states that at the time of the assault complained of in petition defendant, without permission, came into plaintiff's house and began to abuse him;

when plaintiff requested defendant to go out of his house, and defendant refusing, plaintiff laid his hands on him and gently ejected him, using no more force than was necessary, and this is the assault and battery alleged in the answer.

J. R., Atty. for Plff.

REJOINDERS.

[Are necessary whenever the reply avers new matter, such as a counter-claim; see sec. 99.]

SUMMONS—WARNING ORDER.

Summons in Circuit Court in Ordinary Action.

[Sec. 40.]

The Commonwealth of Kentucky to the Sheriff of — County:

You are commanded to summon James Jones to answer, on the first day of the next — term of the — Circuit Court, a petition filed against him in said court by John Smith, and warn him that, upon his failure to answer, the petition will be taken for confessed, or he will be proceeded against for contempt; and you will make due return of this summons on the first day of the next — term of said court.

Witness, — clerk of said court, this — day of —, 189—.

—, C. — C. C.

Summons in Circuit Court in Equitable Action.

. . [The summons in equitable actions is the same as in ordinary actions, except that the words "in equity" should be inserted after the word "petition."]

Summons in Justices' or Quarterly Courts.

[Sec. 701.]

The Commonwealth of Kentucky to any Constable of — County:

You are commanded to summon James Jones to answer in my court, at its next — term, the claim of John Smith against him for [here state what claim is for] amounting to — dollars, which claim has been filed in my office, and warn him that, upon his failure to answer, the claim will be taken for confessed, or he will be proceeded against for contempt.

Given under my hand this — day of —, 189—. —, J. P. — C.

[The summons must be made returnable to the first court held by the justice issuing it, that does not commence within five days from day it is issued. If the amount sued for exceeds fifty dollars, a petition showing the nature of the claim should be filed, and the summons made returnable to the first court that does not commence within ten days from date of summons. The above form of summons will answer if amount exceeds fifty dollars. See secs. 705, 706.]

[The above forms of summons will answer in quarterly courts. If the amount sued for is over fifty dollars, the circuit court form can be used; if under fifty dollars the justice's form.]

Summons on Appeal to Circuit on Quarterly Court.

[Sec. 724.]

John Smith, Appellant, }
vs. } — QUARTERLY COURT [or — CIRCUIT COURT.
 James Jones, Appellee. }

The Commonwealth of Kentucky to the Sheriff of — County:

You are commanded to summon James Jones to appear in the — Quarterly Court [or — Circuit Court] on the first day of its next — term and answer the appeal taken by John Smith from a judgment rendered by Harry James, a justice of the peace for — county [or by the — Quarterly Court] in the action wherein said Jones was plaintiff and said Smith defendant.

Witness my hand as judge of said court [or clerk of said court], this — day of —, 189—. S. B., J. — Q. C. [or C. — C. C.]

Warning Order. Affidavit for—see page 628.

[Secs. 57-7, 59.]

John Smith, Plaintiff, } — CIRCUIT COURT.
vs. } Warning Order.
 James Jones, Defendant. }

The defendant, James Jones, is warned to appear in this court on the first day of its next — term and answer the petition of the plaintiff, John Smith; and Joseph Fears, a regular practicing attorney of this court, is appointed to correspond with said Jones, and accepts said appointment.

Witness my hand, —, 189—.

S. J., C. — C. C.

BONDS.**Bond of Defendant Upon Transfer of Ordinary Action to Equity Docket.**

[Sec. 14.]

John Smith, Plaintiff, } — CIRCUIT COURT.
vs. } Bond.
 James Jones, Defendant. }

We agree to pay to the plaintiff, John Smith, any judgment which he may obtain in this action.

Witness our hands this —, 189—.

JAMES JONES.

Approved: — Judge.

SAM KIDD.

Bond of Owner of Lost Obligation.

[Sec. 7.]

John Smith, having executed his note to James Jones for one hundred dollars, dated —, 189—, due six months after date and bearing six per cent interest from date, which note has been lost, we undertake to indemnify said John Smith against any loss which he may sustain by paying James Jones the amount of said note and interest. Witness our hands this —, 189—.

JAMES JONES.

SAM KIDD.

[Sec. 410.]

— CIRCUIT COURT.

SAM KIDD.

[Sec. 435.]

—CIRCUIT COURT.

Attest: S. J., C. — C. C.

HENRY ALLEN.

SAM KIDD.

[Sec. 616.]

—CIRCUIT COURT.

JOHN SMITH.

Attest: S. J., C. — C. C.

HENRY ALLEN.

[This form will answer in justices', quarterly and other courts.]

[Sec. 697.]

— CIRCUIT COURT.

— months after date we, Henry Allen, principal, and Sam Kidd, surety, promise to pay to John Smith one hundred dollars, with — per cent interest thereon from this date; it being for the purchase price of —, bought by said Henry Allen at — sale made under order of court in the above-styled cause.

Attest :

HENRY ALLEN.

SAM KIDD.

[This form will answer in sales made by commissioners, sheriffs or constables under order of court by changing it to conform to the proceedings under which it is taken.]

For other bonds see *Arrest and Bail; Claim and Delivery of Personal Property; Attachment; Attachment for Rent; Injunction; Execution; Distress Warrant; Appeals.*

AFFIDAVITS.**Verification by Party.**

[Sec. 551.]

The defendant, William Graves, says that [the statements of the foregoing petition are true; or] he believes the statements of the foregoing petition are true.

WILLIAM GRAVES.

Subscribed and sworn to before me by William Graves, this —, 189—.

S. J., C. — C. C.

Form of Verification by Agent or Attorney.

[Sec. 550-5.]

William Graves states that he is the attorney [or agent] of John Smith, who is absent from — county, and the statements of the foregoing answer are true [or, true as he believes].

WILLIAM GRAVES.

Subscribed and sworn to before me by William Graves, this —, 189—.

S. J., C. — C. C.

Verification of Pleading by Agent or Attorney.

[Sec. 117-3-a.]

William Graves states that he is the attorney [or agent] of John Smith, who is physically unable to attend before an officer [or who is mentally incapable of taking an oath—or who is absent from — county], and the statements of the foregoing reply are true [or, true as he believes].

WILLIAM GRAVES.

Subscribed and sworn to before me by William Graves, this —, 189—.

S. J., C. — C. C.

To Require Defendant to Execute Bond Before Transfer of Ordinary Action.

[Sec. 14.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Affidavit.

— CIRCUIT COURT.

The plaintiff, John Smith, states that he verily believes he will succeed in this action, and that the collection of his claim after judgment will be endangered by delay arising from such transfer.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this — 10, 189—.

S. J., C. — C. C.

To Have Guardian Ad Litem Appointed.

[Sec. 38, and see notes page 41.]

John Smith, Plaintiff,
vs.
James Jones, etc., Defendants. } Affidavit.

— CIRCUIT COURT.

The plaintiff, John Smith, states that the defendant, James Jones, is under twenty-one years of age, and has no guardian, curator, nor committee residing in this State, known to affiant.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

[This affidavit may be made by the attorney for plaintiff.]

S. J., C. — C. C.

To Have Warning Order Made.

[Sec. 58, and notes thereto.]

John Smith, Plaintiff, }
 vs. } Affidavit. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff, John Smith, states that the defendant, James Jones, is a non-resident of this State, and, as affiant believes, is absent therefrom, and that defendant resides in — county, in the State of —; and —, in said county and State, is the name of the place wherein a post-office is kept nearest to the place where defendant resides.

JOHN SMITH.

Subscribed and sworn to before by John Smith, this —, 189—.

S. J., C. — C. C.

To Have Warning Order Made.

[Sec. 58, and notes thereto.]

John Smith, Plaintiff, }
 vs. } Affidavit. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff, John Smith, states that the defendant, James Jones, has been absent from this State during the four months last past, and affiant has no knowledge or information as to the country in which defendant resides or may be found, or as to the name of the place wherein a post-office is kept nearest to the place where defendant resides or may be found.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

S. J., C. — C. C.

[If this affidavit is made by an agent or attorney, it should state the affiant's belief that the plaintiff is ignorant of such of the facts as are unknown to the affiant. Secs. 58-3; 550-2.]

To Require Party to Verify Personally His Pleading.

[Sec. 117-4.]

John Smith, Plaintiff, }
 vs. } Affidavit. — CIRCUIT COURT.
 James Jones, Defendant. }

The plaintiff, John Smith, states that he believes that the defendant, James Jones, whose answer herein has been verified by said defendant's attorney, knows that the statement in said answer that the note sued on is entitled to a credit of one hundred dollars as of —, 189—, is untrue; and that his motion to require said defendant to verify in person said answer is not made for delay.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

S. J., C. — C. C.

On Note Against Decedent's Estate.

[Sec. 437; and see secs. 3870-3872, Ky. Stat.]

The affiant, John Smith, states that the within note [or note hereto attached] against the estate of James Jones is a just demand, and has never, to his knowledge or belief, been paid, and that there is no offset or discount against the same, or any usury embraced therein [if there is any offset or discount against note, or if it contains any usury, state the facts.]

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

HARRY ALLEN, J. P. — C.

On Account Against Decedent's Estate.

The owner of the account must make affidavit as on note, and in addition thereto must have the affidavit of another person stating that the account has never, as he believes, been paid, and giving the reasons whereby he is able to state that it is just and unpaid. See Ky. Stat., sec. 3870; and notes to sec. 437.

That Officer May Require Surety to Make Before Accepting Him on Bond.

[Sec. 683.]

John Smith states that he is a resident of the State of Kentucky; that he is worth — dollars beyond the amount of his debts, and has property in said State subject to execution of the value of — dollars.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—

S. J., C. — C. C.

For other affidavits, see *Arrest and Bail; Claim and Delivery of Property; Attachment; Attachment for Rent.*

ARREST AND BAIL.**Affidavit.**

[Sec. 153.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Affidavit.

— COURT.

The plaintiff, John Smith, states that his claim in this action against the defendant, James Jones, is for money due upon a note, executed to him by defendant; that it is a just claim, and plaintiff believes that he ought to recover thereon the sum of one hundred dollars, with six per cent interest from —, 189—, and that defendant is about to depart from this State, and, with intent to defraud his creditors, has concealed his property, or so much thereof, that the process of the court after judgment can not be executed [or state any other ground mentioned in sec. 153, sub. 4].

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

HENRY ALLEN, J. P. — C.

Bond for the Plaintiff.

[Sec. 154.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We undertake that the plaintiff, John Smith, shall pay to the defendant, James Jones, the damages, not exceeding two hundred and fifty dollars, which he may sustain by reason of his being arrested, if the order therefor in this action is wrongfully obtained

JOHN SMITH.

—, 189—.

SAM KIDD.

Attest: S. J., C. — C. C.

Order of Arrest.

[Sec. 155.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Order of Arrest.

— CIRCUIT COURT.

The Commonwealth of Kentucky to the Sheriff of — County:

In an action pending in the — Circuit Court between John Smith, plaintiff, and James Jones, defendant, the plaintiff has filed an affidavit to obtain an order of arrest against the defendant, in which it is specified that the plaintiff's claim against the defendant in the action is one hundred dollars, with six per cent interest from —, 189—.

You are therefore commanded to arrest the defendant, James Jones, and hold him to bail in the sum of one hundred and forty dollars, and you will make return of this order on the first day of the next — term of the said court, together with the bail bond, if any be taken by you.

Witness, S. J., clerk of said court, this —, 189—.

S. J., C. — C. C.

Bail Bond.

[Sec. 163.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Bail Bond.

— CIRCUIT COURT.

I undertake, as bail for the defendant, James Jones, that, if judgment shall be rendered against him in this action, he will render himself amenable to the process of the court thereupon.

HENRY ALLEN.

—, 189—.

Attest: J. W., S. — C

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

Affidavit.

[Sec. 181.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Affidavit.

— CIRCUIT COURT.

The plaintiff, John Smith, states that the horse claimed by him in this action is of bay color, about fifteen hands high, ten years old, and has a white spot in his forehead, and is worth one hundred dollars, and that he ought to recover fifty dollars damages for the detention of him; that plaintiff is the owner of and entitled to the immediate possession of said horse, and that he is wrongfully detained by the defendant, and was not taken for a tax or fine against the plaintiff, or under any order or judgment of a court against him, nor seized under an execution distress warrant or attachment against his property, and that plaintiff's cause of action herein has accrued within one year prior to this date.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

S. J., C. — C. C.

To Obtain an Order of Delivery for Property Taken Under an Execution.

[Sec. 181.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Affidavit.

— CIRCUIT COURT.

The plaintiff, John Smith, states that the horse claimed by him in this action is of bay color, about fifteen hands high, ten years old, and has a white spot in his forehead, and is worth one hundred dollars, and he ought to recover fifty dollars, damages for the detention of him; that plaintiff is the owner of and entitled to the immediate possession of said horse, that he is wrongfully detained by the defendant, and was taken from him under an execution issued from the office of the clerk of — Circuit Court in favor of Henry Allen, and against plaintiff, and that said horse was at the time he was so taken by statute exempt from such seizure; that the plaintiff's cause of action herein has accrued within one year prior to this date.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

S. J., C. — C. C.

[If the property is taken under an attachment or distress warrant this form will answer by describing the kind of process under which the property was seized, as provided in sec. 181-5, 6.]

Order of Delivery.

[Sec. 183.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Order of Delivery.

— CIRCUIT COURT.

The Commonwealth of Kentucky to the Sheriff of — County :

In the action of John Smith, plaintiff, against James Jones, defendant, pending in the — Circuit Court, you are directed to take from the possession of the defendant, James Jones, a bay horse, about fifteen hands high, ten years old, with a white star in his forehead, and of the value of one hundred dollars, and deliver him to the plaintiff, John Smith, and you will make due return of this order on the first day of the next — term of the — Circuit Court.

Witness, S. J., clerk of said court, this —, 189—.

S. J., C. — C. C.

Bond of Plaintiff to Sheriff Before He Complies with the Order.

[Sec. 184.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We undertake to the defendant, James Jones, that the plaintiff, John Smith, shall duly prosecute this action, and shall perform the judgment of the court therein, by returning the horse ordered to be delivered to the plaintiff, if a return be adjudged, and by paying to the defendant, James Jones, such sums of money as may be adjudged in this action against the plaintiff, not exceeding two hundred dollars and the costs of the action.

—, 189—.

JOHN SMITH.

HENRY ALLEN.

Attest: J. W., S. — C.

Bond of Plaintiff When the Property is taken Under an Execution.

[Sec. 185.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We undertake that the plaintiff, John Smith, shall duly prosecute this action, and shall perform the judgment of the court therein, by returning the horse ordered to be delivered to the plaintiff, if a return be adjudged, and by paying, as may be directed by the court, to the defendant, James Jones, or to Henry Allen, the plaintiff, in an execution from the — Circuit Court against Sam Kidd, under which said horse was taken by James Jones, such sums of money as may be adjudged in this action against the plaintiff, not exceeding two hundred dollars and costs of this action.

JOHN SMITH.

JOSEPH DAVIS.

—, 189—.

Attest: J. W., S. — C.

[This form of bond is to be executed when the plaintiff's property is taken under an execution not against him (sec. 185), and will answer if property is taken under attachment or distress warrant.]

Bond of Defendant to Retain Property.

[Sec. 188.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We bind ourselves to the plaintiff, John Smith, in the sum of — dollars, that the defendant, James Jones, shall perform the judgment of the court in this action.

— 10, 189—.

HENRY ALLEN.

Attest: J. W., S. — C.

JAMES JONES.

[If the property was taken under an execution attachment or distress warrant defendant can not retain it by giving bond. Sec. 187.]

Bond to Sheriff When Property Claimed by Person Other than Defendant.

[Sec. 191.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We undertake to indemnify —, sheriff of — county, against any damage he may sustain on account of the claim of Henry Allen to the property mentioned in the order of delivery, not exceeding — dollars.

—, 189—.

Attest: J. W., S. — C.

JOHN SMITH.

SAM KIDD.

Form of Appraisement Before Taking Bond.

[Sec. 189.]

The undersigned, disinterested housekeepers, having been selected and sworn by J. W., S. — C., do appraise the property mentioned in the order of delivery, viz.: one bay horse, at one hundred dollars.

—, 189—.

Attest: J. W., S. — C.

JOHN DAVIS.

HENRY ALLEN.

SAM KIDD.

ATTACHMENT.

Affidavit for General Attachment.

[Sec. 196.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Affidavit.

— CIRCUIT COURT.

The plaintiff, John Smith, states that the claim in this action against defendant, James Jones, is for money due for [here state cause of action] that it is a just claim, and he ought, as he believes, to recover thereon — dollars, with interest from —, 189—, and that the defendant is about to sell, convey, or otherwise dispose of his property, with the fraudulent intent to cheat and delay his creditors [or state any other ground mentioned in sec. 194].

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—,

S. J., C. — C. C.

Bond of Plaintiff to Obtain Attachment.

[Sec. 198.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We undertake that the plaintiff, John Smith, shall pay to the defendant, James Jones, the damages, not exceeding — dollars, which he may sustain by reason of the attachment in this action, if the order therefor be wrongfully obtained.

—, 189—.

JOHN SMITH

Attest: S. J., C. — C. C.

HENRY ALLEN.

[If there is more than one defendant, the bond should be as follows: "Pay to the defendants, James Jones and Sam Kidd, the damages, not exceeding — dollars, which they, or either of them."]

Order of General Attachment.

[Sec. 199.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Order of Attachment.

— CIRCUIT COURT.

The Commonwealth of Kentucky to the Sheriff of — County:

You are commanded to attach and safely keep the property of the defendant, James Jones, in your county, not exempt from execution, or so much thereof as will satisfy the claim of the plaintiff in this action, John Smith, for — dollars; and — dollars for the costs of the action; and to summon the garnishees, if any, to answer herein on the first day of the next — term of the — Circuit Court; and you will make due return of this order on that day.

Witness, S. J., clerk of said court, this —, 189—.

S. J., C. — C. C.

Order of Attachment from Justice's or Quarterly Court.

[Sec. 199.]

John Smith, Plaintiff, }
 vs. } Order of Attachment.
 James Jones, Defendant. }

The Commonwealth of Kentucky to any Constable of — County:

You are commanded to attach and safely keep the personal property of the defendant, James Jones, in your county, not exempt from execution, or so much thereof as will satisfy the claim of the plaintiff in this action, John Smith, for — dollars; and ten dollars for the costs of the action; and to summon the garnishees, if any, to answer herein on the first day of the next — term of my court; and you will make due return of this order on that day.

Witness, Harry Allen, justice of the peace for — county, this —, 189—.

H. A., J. P. — C.

Notice to Garnishee to be Indorsed on Order of Attachment.

[Sec. 203-3.]

Henry Allen is notified that he is summoned to answer as a garnishee herein on or before the first day of the next — term of the — Circuit Court.
 —, 189—.

S. J., C. — C. C.

[If the property to be attached is not a debt or demand due defendant, nor property capable of manual delivery but is (to illustrate) certificates of stock or bonds, the notice should specify the specific property to be attached.]

Notice to Garnishee to be Indorsed on Summons.

[Sec. 442.]

The object of this action is to attach in the hands of Henry Allen any money he owes defendant, James Jones, not exceeding — dollars.
 —, 189—.

S. J., C. — C. C.

[These notices to garnishees can be indorsed on attachment or summons from justices' courts.]

Bond of Indemnity to Officer Levying Attachment.

[Sec. 211.]

John Smith, Plaintiff, }
 vs. } Bond.
 James Jones, Defendant. }

— CIRCUIT COURT.

We undertake to indemnify — sheriff of — county, against any damage he may sustain by reason of the levy of the attachment in this action.
 —, 189—.

JOHN SMITH

Attest: J. W., S. — C.

HENRY ALLEN.

Bond of Plaintiff to a Joint Owner of Attached Property.

[Sec. 206.]

John Smith, Plaintiff, }
 vs. } Bond.
 James Jones, Defendant. }

— CIRCUIT COURT.

We undertake that the plaintiff, John Smith, shall pay to Henry Allen, a joint owner with the defendant, James Jones, of a brown mare, levied on under an attach-

ment in this action, the damages, not exceeding — dollars, which said Allen may sustain by the wrongful suing out of the order of attachment.

—, 189—.

Attest: J. W., S. — C.

JOHN SMITH.

SAM KIDD.

Bond for Attached Property by Person in Possession.

[Sec. 214.]

John Smith, Plaintiff, }
vs. } Bond.
James Jones, Defendant. }

— CIRCUIT COURT.

We bind ourselves to the plaintiff, John Smith, in the sum of — dollars, that the defendant, James Jones, shall perform the judgment of the court in this action, or that the property attached in this action, or its value, shall be forthcoming and subject to the order of the court.

—, 189—.

Attest: J. W., S. — C.

HENRY ALLEN.

JOHN ROBERTS.

Form of Appraisement Before Taking Bond from Person in Possession.

[Sec. 215.]

We, the undersigned disinterested housekeepers, selected and sworn by J. W., S. — C., do appraise the property levied on under this attachment, viz.: one brown mare, at — dollars.

—, 189—.

Attest: J. W., S. — C.

J. SWIFT.

TOM RIBE.

ROBERT WILLIAMS.

Bond of Defendant to Discharge Attachment.

[Sec. 221.]

John Smith, Plaintiff, }
vs. } Bond.
James Jones, Defendant. }

— CIRCUIT COURT.

We bind ourselves to the plaintiff, John Smith, that the defendant, James Jones, shall perform the judgment of the court in this action.

—, 189—.

Attest:

JAMES JONES.

HENRY ALLEN.

ATTACHMENT FOR RENT.

Affidavit When Rent is Due.

[See Ky. Stat., secs. 2302, 2303.]

The affiant, John Smith, states that James Jones is indebted to him in the sum of — dollars for the rent of his, Smith's, farm, in — county, Kentucky, for the year ending —, 189—; that said rent was due on —, 189—, and no part thereof has been paid, and that there are reasonable grounds for belief, and that he believes, unless an attachment be issued, he will lose his said rent.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

H. A., J. P. — C.

[This affidavit can be made by the agent or attorney of landlord, the affidavit stating the fact that affiant is agent or attorney. Ky. Stat., sec. 2302.]

Affidavit Before Rent is Due.

[See Ky. Stat., secs. 2302, 2303.]

The affiant, John Smith, states that on —, 189—, he rented his farm, in — county, Kentucky, to James Jones, for the year ending —, 189—; that said Jones agreed to pay him on —, 189—, as rent for said farm, — dollars; that no part of said rent has been paid, and that there are reasonable grounds for belief, and that he believes, unless an attachment be issued he will lose his said rent.

JOHN SMITH.

Subscribed and sworn to before me by John Smith, this —, 189—.

H. A., J. P. — C.

[This affidavit can be made by the agent or attorney of the landlord, the affidavit stating the fact that the affiant is agent or attorney. See Ky. Stat., sec. 2302.]

Bond of Landlord to Obtain Attachment for Rent.

[See Ky. Stat., sec. 2302.]

John Smith, Plaintiff,
 vs.
 James Jones, Defendant. } Bond.

We undertake that the plaintiff, John Smith, shall indemnify the defendant, James Jones, against the damages which he may sustain by reason of the attachment hereia, if it appear that the attachment has been wrongfully obtained.

JOHN SMITH.

SAM KIDD.

—, 189—.

Attest: H. A., J. P. — C.

Order of Attachment.

[The form of "Order of attachment from justices' or quarterly court," on page 634, will answer.]

INJUNCTIONS.

Bond to Discharge Levy Made Under an Execution.

[Sec. 278.]

John Smith, Plaintiff,
 vs.
 James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We undertake to satisfy the execution which the plaintiff seeks to enjoin in this action to the extent to which the injunction may be dissolved, not, exceeding the sum of one hundred dollars, the value of the property released.

JOHN SMITH.

HENRY ALLEN.

—, 189—.

S. J., C. — C. C.

[For the purpose of ascertaining the value of the property levied on, and to release which the injunction is desired, the officer must have property appraised. Sec. 278.]

Form of Appraisement.

We, the undersigned, disinterested housekeepers, having been selected and sworn by J. W., S. — C., do appraise the property levied on under an execution from the — Circuit Court, in favor of James Jones, and against John Smith, viz.: One bay horse at one hundred dollars.

—, 189—.

Attest: J. W., S. — C.

SAM KIDD.

HENRY WILLIAMS.

TOM DAVIS.

Bond, if Party Does Not Desire to Discharge Levy.

[Sec. 278.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We undertake that the plaintiff, John Smith, upon the dissolution, in whole or in part, of the injunction herein granted, shall have the property levied on under the execution enjoined, or its value, forthcoming, and subject to the order of the court.

—, 189—.

Attest: S. J., C. — C. C.

JOHN SMITH.

HENRY ALLEN.

[For the purpose of ascertaining the value of the property levied on it must be appraised. See form of appraisement just preceding.]

Bond, if the Terms Are Not Prescribed by the Court or Judge Granting.

[Sec. 278.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We undertake that the plaintiff, John Smith, shall pay to the defendant, James Jones, such damages as he may sustain if it be finally decided that the injunction ought not to have been granted.

— 1, 189—.

Attest: S. J., C. — C. C.

JOHN SMITH.

HENRY ALLEN.

[In all other cases the court or judge granting the injunction must fix the amount of the bond and prescribe its terms. Sec. 278, subsecs. 2, 3, 4.]

ORDER OF INJUNCTION.

[Sec. 281.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Order of Injunction.

— CIRCUIT COURT.

The Commonwealth of Kentucky to James Jones:

You are hereby enjoined from [here state what the injunction is for in the language of the order of court granting it, or as stated in petition if granted by the clerk].

Witness, S. J., clerk of said court, this —, 189—.

S. J., C. — C. C.

EXECUTIONS AND BONDS THAT MAY BE TAKEN UNDER.

Execution.

[Ky. Stat., sec. 1651.]

The Commonwealth of Kentucky to the Sheriff of — County—GREETING :

We command you that of the estate of —, you cause to be made the sum of — dollars, which —, late in our — Circuit Court, hath recovered against him for debt, with interest thereon from the — of —, 189—, until paid; also, the sum of — dollars, which to the said —, in the same court, were adjudged for his costs in that suit expended, whereof he is convicted as appears to us of record, and that you have the said sums of money before our said court on the — of —, 189—, to render to the said — his debt, interest and costs aforesaid, and have then there this writ.

Witness, S. J., clerk of our said court, this —, 189—.

S. J., C. — C. C.

Execution from Justices' or Quarterly Courts.

The Commonwealth of Kentucky to any Constable of — County—GREETING :

We command you that of the goods and chattels of — you cause to be made the sum of — dollars, which — late in our court hath recovered against him for debt, with interest thereon from the — of —, 189—, until paid; also, the sum of — dollars, which to the said — in the same court were adjudged for his costs in that suit expended, whereof he is convicted as appears to us of record, and that you have the said sums of money before our said court on the — of —, 189—, to render to the said — his debt, interest and costs aforesaid, and have then there this writ.

Witness my hand as a justice of the peace for said county, this the — of —, 189—.

H. A., J. P. — C.

Execution for Specific Property and Damages and Costs.

[Code, sec. 330, Ky. Stat., sec. 1665.]

The Commonwealth of Kentucky to the Sheriff of — County—GREETING :

We command you to take from — and deliver to — a bay horse, about fifteen hands high, ten years old, with a star in his forehead [or the plaintiff may have execution for the assessed value of the property and damages and costs], and that of the estate of said — you cause to be made the sum of — dollars in damages, which the said — late in our circuit court recovered against the said —, and the further sum of — dollars, which to the said — was adjudged for his costs in that behalf expended, whereof the said — is convicted, as appears to us of record, and that you make known to the judge of our said court, on the — of — 189—, how you have executed this writ.

Witness, S. J., clerk of our said court, this the — of —, 189—.

S. J., C. — C. C.

[This form will answer in justices' or quarterly courts by changing it to suit the court.]

Execution Against an Executor or Administrator to be Levied of Assets.*The Commonwealth of Kentucky to the Sheriff of — County—GREETING :*

We command you that of the estate of James Jones, deceased, that has or may come to the hands of Henry Allen, his executor (*or administrator*), to be administered, you cause to be made the sum of — dollars, which John Smith late in our — Circuit Court hath recovered against him for debt, with interest thereon from the — of —, 189—, until paid; also, the sum of — dollars, which to the said John Smith was adjudged for his costs in that behalf expended; whereof the said Henry Allen, executor (*or administrator*) aforesaid, is convict, as appears to us of record, and that you have the said sums of money before our said court on the — of —, 189—, to render to the said John Smith the debt, interests and costs aforesaid, and have then and there this writ.

Witness, S. J., clerk of our said court, this —, 189—.

S. J., C. — C. C.

[This form will answer in justices' or quarterly courts by changing it to suit the court.]

CAPIAS AD SATISFACIENDUM.

[Code, sec. 168; Ky. Stat., sec. 1661.]

The Commonwealth of Kentucky to the Sheriff of — County—GREETING :

We command you that you take James Jones, if he be found within your county, and him safely keep, so that you have his body before our judge of our — Circuit Court, at the court-house in the town of —, on the — of —, 189—, to satisfy John Smith the sum of — dollars, which the said John Smith hath recovered against him for damages; also the sum of — dollars, which to the said John Smith, in the same court, was adjudged for his costs, and that you have the same at the said court-house, on the — of —, 189—, to satisfy and pay the said John Smith his damages and costs aforesaid, and have then and there this writ.

Witness, S. J., clerk of our said court, this the — of —, 189—.

S. J., C. — C. C.

VENDITIONI EXPONAS.

[Ky. Stat., sec. 1664.]

The Commonwealth of Kentucky to the Sheriff of — County—GREETING :

We command you that you expose to sale the estate of James Jones, to-wit: —, to the value of — dollars, which, according to our command, you have taken into your hands, and which remains in your hands unsold, as you have certified to our — Circuit Court, to satisfy John Smith the sum of — dollars, whereof in our said court he hath recovered execution against the said James Jones, by virtue of a judgment in the said court, and that you have the same before the judge of our said court on the — of —, 189—, to render to the said John Smith the sum aforesaid, and have then and there this writ.

Witness, —, clerk of our said court, this the — of —, 189—.

S. J., C. — C. C.

Bond of Indemnity to Officer Before Levying an Execution or Distress Warrant.

[Secs. 641, 652.]

—, sheriff [or constable] of — county, having required a bond of indemnity before levying an execution [or distress warrant] issued on the — of —, 189—, from the — Circuit Court [or the court of —, justice of the peace for — county, or the — quarterly court], in favor of John Smith against James Jones, for the sum of — dollars, upon a [here describe property], we undertake to indemnify the said sheriff [or constable] against the damages which he may sustain in consequence of the seizure or sale of the aforesaid property; also to pay to any claimant thereof the damages which he may sustain in consequence of such seizure or sale, and to warrant to any purchaser of said property such estate or interest therein as may be sold.

JOHN SMITH.

SAMUEL ALLEN.

—, 189—.

Attest: J. W., S. — C. [or C. — C.]

Bond of Indemnity to Officer After Levy of an Execution or Distress Warrant.

[Secs. 641, 652.]

—, sheriff [or constable] of — county, having levied an execution [or distress warrant], issued on the — of —, 189—, from the — Circuit Court [or the court of —, a justice of the peace for — county, or the — quarterly court], in favor of John Smith, against James Jones, for the sum of — dollars, upon a [here describe property], and having required a bond of indemnity before he proceeds to sell said property, we undertake to indemnify the said sheriff [or constable] against the damages which he may sustain in consequence of the seizure or sale of the aforesaid property; also, to pay to any claimant thereof the damages which he may sustain in consequence of such seizure or sale, and to warrant to any purchaser of said property such estate or interest therein as may be sold.

—, 189—.

JOHN SMITH.

SAMUEL ALLEN.

Attest: J. W., S. — C. [or C. — C.]

Bond of Claimant to Suspend Sale Under Execution or Distress Warrant.

[Secs. 645, 652.]

The sheriff [or constable] of — county, having levied an execution [or distress warrant], issued on the — of —, 189—, from the — Circuit Court [or the court of —, a justice of the peace for — county, or the — quarterly court], in favor of John Smith, against James Jones, for the sum of — dollars, upon [here describe property], that has been appraised at seventy-five dollars, we undertake that, if it shall be adjudged that the said property [or any part of it] is subject to the said execution [or distress warrant], Henry Allen, who claims it, will pay to John Smith, the plaintiff in the execution [or who sued out the distress warrant], the value of the property so subject, and ten per cent thereon, not exceeding the amount due on the execution [or distress warrant] and ten per cent thereon.

HENRY ALLEN.

SAM KIDD.

—, 189—.

Attest: J. W., S. — C. [or C. — C.]

Form of Appraisement.

[Sec. 646.]

The undersigned, disinterested housekeepers, having been selected and sworn by J. W., sheriff [or constable] of — county, do appraise the mare levied on

under an execution [or distress warrant] in favor of John Smith against James Jones at — dollars.

—, 189—.

Attest: J. W., S. — C. [or C. — C.]

HENRY ROBERTS.

WM. JOHNSTON.

J. GRAVES.

Replevin Bond Before Execution.

[Ky. Stat., sec. 1667.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Bond.

— CIRCUIT COURT.

This day the defendant, James Jones, together with Sam Kidd, his surety, came before me as clerk of the — Circuit Court, and undertook that they would satisfy and pay John Smith his judgment, amounting with interest and costs to one hundred dollars, rendered in his favor against the said James Jones by this court, at its — term, 189—, within three months, with legal interest on the whole amount thereof from this date. Witness our hands, this —, 189—. JAMES JONES.

Attest: S. J., C. — C. C.

SAM KIDD.

[This form will answer in justices', quarterly and other courts by changing it to suit court.]

Replevin Bond After Execution.

[Ky. Stat., sec. 1669.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We, James Jones, principal, and Henry Allen, surety, do bind ourselves, three months after the date hereof, to pay John Smith, the plaintiff in the execution, the sum of — dollars, to bear interest from this date, being the amount of an execution which issued from the clerk's office of the circuit court of — county, on —, 189—, in favor of said John Smith for the sum of \$—, debt, \$—, interest, \$—, costs of suit, \$—, sheriff's half commission, amounting in the whole to the sum of \$—, aforesaid, against the said James Jones; and we the said James Jones and Henry Allen, his surety, have hereby replevied the same. Witness our hands this —, 189—.

Attest: J. W., S. — C.

JAMES JONES.

HENRY ALLEN.

[This form will answer for constables.]

Sale Bond for Property Sold Under Execution or Distress Warrant.

[Ky. Stat., sec. 1674.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Bond.

— CIRCUIT COURT.

We, Henry Allen, principal, and Sam Kidd, surety, do bind ourselves to pay to John Smith, within three months from the date hereof, the sum of — dollars, with interest thereon from this date, being the purchase money for one bay horse, which was this day sold by J. W., sheriff of — county, in satisfaction of an execution, which issued from the office of the clerk of the — Circuit Court, on the — of —, 189—, in favor of the said John Smith, against James Jones, for the sum of — dollars, with interest and costs.

Given under our hands this —, 189—.

HENRY ALLEN.

Attest: J. W., S. — C.

SAM KIDD.

[This form will answer in sales made by constables and in sales made under distress warrants by changing it to suit process under which property is sold.]

DISTRESS WARRANTS AND BONDS TAKEN UNDER.

Distress Warrant.

[See Ky. Stat., sec. 2301.]

The Commonwealth of Kentucky to the Sheriff or any Constable of — County—GREETING:

John Smith having made oath before me that James Jones is indebted to him in the sum of one hundred dollars, for the rent of his (Smith's) farm in — county, Kentucky, for the year ending —, 189—, and that said rent was reserved in money, was due —, 189—, and no part thereof has been paid.

You are therefore commanded to distrain so much of the personal estate of said James Jones, found in your county, not exempt from execution, as will satisfy the amount due as aforesaid, with interest thereon from —, 189—, and the costs of this distress. And you will make due return of the manner in which you have executed this warrant.

Witness my hand, as justice of the peace for — county, this —, 189—.

[A written affidavit is required.]

H. A., J. P. — C.

Replevin Bond that Tenant may Give.

[Ky. Stat., sec. 2310.]

We, James Jones, principal, and Sam Kidd, surety, do bind ourselves to pay, three months after the date hereof, to John Smith, the plaintiff in the distress warrant, the sum of — dollars, to bear interest from this date, it being the amount of a distress warrant issued by Harry Allen, a justice of the peace for — county, on —, 189—, in favor of said Smith, for the sum of — dollars, debt; — dollars, interest; — dollars, costs, and — dollars, commission, amounting in the whole to the sum of — dollars aforesaid, against the said James Jones; and we, the said James Jones and Sam Kidd, have replevied the same. Witness our hands this —, 189—.

JAMES JONES.

Attest: J. W., S. — C. [or C. — C.]

SAM KIDD.

Bond of Indemnity to Officer Before Levying a Distress Warrant.

[Sec. 652.]

The form of "bond of indemnity to officer before levying an execution or distress warrant," on page 640, will answer.

Bond of Indemnity to Officer After Levying a Distress Warrant.

[Sec. 652.]

The form of "bond of indemnity to officer after levy of an execution or distress warrant," on page 640, will answer.

Bond of Claimant to Suspend Sale Under a Distress Warrant.

[Sec. 652.]

The form of "bond of claimant to suspend sale under execution, or distress warrant," on page 640, will answer by inserting "distress warrant" in place of "execution" therein.

Bond of Tenant to Suspend Sale Under Distress Warrant.

[Sec. 653.]

We undertake that James Jones will pay to John Smith one hundred dollars, that being the amount of rent specified in the distress warrant issued by H. A., J. P. — C., on —, 189—, in favor of said Smith against said Jones, with ten per cent thereon if the property distrained be of the value of — dollars, or if said property, to-wit, [here describe property], and which has been appraised at — dollars, as appears from the appraisal hereto annexed, be of less value, that he will pay to said Smith the value thereof and ten per cent thereon.

— 10, 189—.

JAMES JONES.

Attest: J. W., S. — C. [or C. — C.]

SAM KIDD.

Form of Appraisement.

[Sec. 653.]

The "Form of Appraisement" on page 640 will answer.

Sale Bond of Purchaser of Property Sold Under Distress.

Bond for sale of property sold under execution, page 641, will answer by changing "execution" to distress warrant.

SUBPŒNA—WARRANT OF ARREST.**Subpœna in Circuit Court.**

[Sec. 528.]

The Commonwealth of Kentucky to the Sheriff of — County:

You are commanded to summon Sam Kidd and B. F. Allen to appear before the — Circuit Court, on the — of —, 189—, to testify on behalf of the plaintiff [or defendant] in an action pending in said court, wherein John Smith is plaintiff and James Jones is defendant.

Given under my hand this —, 189—.

S. J., C. — C. C.

[If the production of a writing is desired, describe it particularly in the subpœna, and state the name of the witness who is to produce it. Sec. 528.]

Subpœna in Justices' Court.

[Sec. 701.]

The Commonwealth of Kentucky to any Constable of — County:

You are commanded to summon Sam Kidd and B. F. Allen to appear before me, at my court in —, Kentucky, on the — of —, 189—, to testify on behalf of the plaintiff [or defendant] in an action pending in said court, wherein John Smith is plaintiff and James Jones is defendant.

Given under my hand, this —, 189—.

H. A., J. P. — C.

Warrant of Arrest.

[Sec. 537.]

The Commonwealth of Kentucky to the Sheriff of — County:

You are commanded to arrest Sam Kidd, and have him before the — Circuit Court, on the — of —, 189—, to testify on behalf of the plaintiff [or defend-

ant] in an action in said court, wherein John Smith is plaintiff and James Jones is defendant, and to answer for his disobedience of the subpoena served on him, and you will admit him to give bail for his appearance in the sum of — dollars.

Given under my hand, this —, 189—.

S. J., C. — C. C.

[This form will answer in justices' or quarterly courts by changing it to suit court.]

Bail Bond to be Indorsed on Warrant of Arrest.

[Sec. 537.]

We acknowledge ourselves bound to the Commonwealth of Kentucky in the sum of — dollars as bail that Sam Kidd will appear at the time and place named in the within warrant.

—, 189—.

SAM KIDD.

HENRY ALLEN.

Attest: J. W., S. — C.

DEPOSITIONS.

Form of Notice.

[Sec. 566.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Notice.

— CIRCUIT COURT.

The defendant, James Jones, is notified that the plaintiff, John Smith, will, on — 10, 189—, at the law office of —, in the town of —, — county, Kentucky, take the depositions of sundry witnesses to be read as evidence in his behalf on the trial of the above-styled case, and will continue the taking from day to day until through.

W. G., Atty. for Plff.

[If the depositions are taken out of the county in which the action is pending the notice must give names of witnesses. Sec. 566.]

Subpoena—Warrant of Arrest.

[Sec. 578.]

The subpoena for witnesses and warrant of arrest, if necessary, to be issued by officer taking depositions, may be similar to forms under "Subpoena—Warrant of Arrest," on page 643.

Caption of Deposition.

[Sec. 582.]

The deposition of Ben Allen, taken on —, 189—, at the law office of —, in the town of —, to be read as evidence in an action between John Smith, plaintiff, and James Jones, defendant, pending in the — Circuit Court.

Certificate of Examining Officer.

[Sec. 582.]

State of Kentucky — County:.

I, —, examiner for — county, certify that the foregoing deposition of Ben Allen was taken before me at the time and place stated in the caption; that said witness was duly sworn before giving it; that it was written by me in his presence,

and read to and subscribed by him in my presence [or written and subscribed by him in my presence]. [State whether either party was present, in person or by agent or attorney, and if any, who was present.]

Given under my hand this —, 189—.

—, Examiner.

Commission to Take Depositions on Interrogatories.

[Sec. 577.]

STATE OF KENTUCKY, }
— CIRCUIT COURT. } Commission.

To any officer authorized to take depositions in or out of this State:

You are hereby commissioned to take the depositions of Henry Allen and Sam Kidd upon the interrogatories and cross-interrogatories hereto annexed.

Given under my hand, this —, 189—.

S. J., C. — C. C.

Form of Bill of Exceptions and Rules.

[See Code, sec. 335, and notes thereto.]

It is not necessary to mention or include in the bill of exceptions any of the pleadings that have been filed, or that have been offered to be filed and refused if orders (as they should do) show offer and refusal and state that rejected pleading is made a part of record; nor is it necessary to embrace or mention in the bill the motion or grounds for new trial, or any of the orders of the court, or rulings of the court that appear on the order book. The object of the bill of exceptions is to show the facts occurring during the trial that would not otherwise appear and that no record is made of on the order book. It is usual to prepare the bill as follows:

Be it remembered that on the trial of this action the plaintiff testified for himself in substance as follows [here state substance of his testimony], and then plaintiff introduced as a witness in his behalf John Jones, who testified in substance as follows [here state substance of testimony—and so on with each witness for plaintiff].

* * * * *

The plaintiff having concluded his testimony, the defendant then testified for himself [here state as with reference to plaintiff and his witnesses]. Upon the conclusion of defendant's evidence, the plaintiff was introduced in rebuttal and testified as follows [state as above with reference to all witnesses in rebuttal].

Upon the conclusion of the testimony the plaintiff asked the court to give instruction "No. 1," which is as follows: [here insert it] defendant objected, his objection was overruled and said instruction given to which he excepted; the defendant moved the court to give instruction "No. 2," which is as follows: [here insert it] to which plaintiff objected, his objection was sustained and said instruction refused, to which ruling of the court the defendant excepted. The court on its own motion gave instruction "No. 3," which is as follows: [here insert it]. To the giving of this instruction the plaintiff [or defendant, as the case may be] at the time excepted. The foregoing instructions are the only ones that were offered or refused or given.

[If anything occurs after instructions are given and before verdict is rendered that either party desires to have inserted in bill it should appear here.] The bill should close as follows: Then came plaintiff [or defendant] and tendered this his bill of exceptions, which having been examined and approved by the judge, is ordered to be filed and made a part of the record without being spread on the order book.

— Judge.

The following rules will be of service to the young practitioner :

Rule 1. If a reversal is asked because the evidence does not support the verdict then the *whole* of the evidence of each witness must appear in the bill, and in place of stating that "the witness testified in substance as follows," state at the conclusion of the testimony of each witness "the above is the testimony in full of the witness."

Rule 2. If the adverse party asks a witness a question that is objected to, the bill should state the question objected to, and if the objection is overruled and the witness allowed to answer question the bill should state the answer and that "an exception was taken to the ruling of the court;" the following statement will illustrate the practice: The plaintiff asked witness [here state question], defendant objected, his objection was overruled and witness permitted to answer the question [state answer] to which ruling of the court defendant excepted. The objection and exception should be made at the time and the bill should so show.

Rule 3. If a party asks his witness a question and the adverse party objects, and his objection is sustained, the party should then write out and submit to the court the answer he expects the witness to make to the question; and if the court declines to permit witness to answer, the bill should state the question and the answer and should show that an exception was taken at the time to the ruling of the court in excluding answer.

Rule 4. When adverse party offers any evidence or to take any step during trial that is objected to, it is necessary that the bill should show that an *objection* was taken at the time, and also that an *exception* was taken at the time to the ruling of the court in overruling the objection.

Rule 5. When a party offers to take any step or introduce any evidence during trial that an objection is made and sustained to, an *exception* should be taken to the ruling of the court at the time, and the bill should so show.

Rule 6. If deeds, papers, depositions, books, records or other like evidence is offered, and an objection sustained to its introduction, it should be copied in the bill and identified as follows: "Plaintiff here offered to read a deed [or whatever it may be, describing it] to which defendant objected, his objection was sustained and said deed not allowed to be introduced as evidence, to which ruling of the court the plaintiff at the time excepted. Said deed is as follows: [here insert it], or—the defendant here offered to read a letter [or whatever it may be, describing it] from Frank Hall to Wm. Burton, dated January 1, 1895, plaintiff objected to the reading of said letter, his objection was overruled and said letter permitted to be read as evidence, to which ruling of the court plaintiff at the time excepted. Said letter is as follows [here insert it]."

Rule 7. If the court, *on its own motion*, rules against a party, an exception taken by him at the time to the ruling is sufficient; an objection is not required.

Rule 8. The bill should contain each instruction offered and refused and given, and should show that an objection was made at the time to giving those offered by the adverse party, and if they were given, that an exception was taken at the time. If the court on its own motion gives an instruction, an exception to it will be sufficient, and if a party offers an instruction which is refused, the bill should show that an exception to the ruling was taken at the time. A general exception to all the instructions has been held sufficient, but the safer plan is to object and except [or except, as the case may be] to the ruling of the court upon each instruction.

Rule 9. It is not necessary that the attorney in preparing the bill should copy into it all deeds, papers and exhibits offered or used, or the instructions, but he should arrange the bill so that each will be identified, and so that the clerk in copying the

bill can insert them in proper place. The following will illustrate: The court refused to give instruction "No. 1" offered by plaintiff, which is as follows: [here insert it]; the court gave instruction "No. 2," on its own motion, or offered by defendant, which is as follows: [here insert it]. The defendant offered to read deed from Jones to Smith, which deed is as follows: [here insert it]. The clerk in making record can then insert at proper places.

JUDGMENTS IN ORDINARY ACTIONS.

By Default on Note for Payment of Money.

[Sec. 368.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Judgment.

— CIRCUIT COURT.

The defendant, James Jones, having been duly summoned and failing to answer, it is adjudged by the court that the plaintiff, John Smith, recover of the defendant — dollars, with interest thereon at the rate of six per cent per annum from the — of —, 189—, until paid, and his costs herein expended.

When There is a Trial and Verdict for Plaintiff.

[Sec. 368.]

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Judgment.

— CIRCUIT COURT.

The parties appeared by their attorneys, and upon the trial of this cause the following jurors [name them] were sworn to try the issue, and, having heard the evidence, the instructions of the court and argument of counsel, rendered the following verdict: "We, of the jury, find for the plaintiff one hundred dollars. Sam Allen, Foreman." It is, therefore, adjudged by the court that the plaintiff, John Smith, recover of the defendant, James Jones, one hundred dollars, with interest thereon at the rate of six per cent per annum, from —, 189—, until paid, and his costs herein expended.

When There is a Trial by the Court and Judgment for the Defendant.

John Smith, Plaintiff,
vs.
James Jones, Defendant. } Judgment.

— CIRCUIT COURT.

Judgment when law and facts are submitted to the court, and there is a request for a separation of the findings of law and fact. [See sec. 332, and notes thereto.]

Upon the hearing of this case the court finds the facts to be as follows:

1. That the defendant was the surety in the note sued on.
2. That after he signed said note and without his consent, it was altered by changing the time of payment from March 10, 1894, to April 10, 1895.
3. As matter of law the court adjudges that the said alteration releases the defendant. The plaintiff excepts to each of the above findings of fact, and also to the conclusion of law.

[Sec. 368.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Judgment.

— CIRCUIT COURT.

Came the parties by their attorneys, and by agreement the facts were submitted to the court, and the court, being advised, adjudges that the plaintiff's petition be dismissed and that the defendant recover of the plaintiff his costs in this action expended. [See preceding form.]

Judgment on Demurrer to Petition.

[Sec. 368.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Judgment.

— CIRCUIT COURT.

This cause being heard on a demurrer to the petition, and the court being advised sustains the demurrer, to which plaintiff excepts, and leave is given the plaintiff to amend his petition, and he declining to amend, and electing to stand by his petition, the same is dismissed; and it is adjudged that the defendant recover of the plaintiff his costs in this action expended. The plaintiff prays an appeal to the Court of Appeals, which is granted.

Overruling Demurrer to Answer.

[Sec. 368.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Order.

— CIRCUIT COURT.

Came the parties by their attorneys and the demurrer heretofore filed to the answer is overruled, to which the plaintiff excepts, and thereupon the plaintiff filed his reply, and the parties announcing themselves ready for trial came this jury —.

Judgment for Plaintiff in Action for Personal Property.

[Sec. 330.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Judgment.

— CIRCUIT COURT.

Came the parties by their attorneys and upon the trial of this cause, the following jurors [name them] were sworn to try the issue, and having heard the evidence rendered the following verdict: "We, the jury, find for the plaintiff the [here describe property] in the petition mentioned, and find its value to be — dollars, and assess the damages for its detention at — dollars. Ben Allen, Foreman." It is therefore adjudged by the court that the plaintiff recover of the defendant — dollars, damages for the detention of the — in the petition mentioned, and the plaintiff's costs herein expended, and the said — if to be had; or, if not to be had, — dollars, its value.

JUDGMENTS IN EQUITABLE ACTIONS.

Commencement of Judgment by Default.

[Sec. 368.]

John Smith, Plaintiff, }
vs. } Judgment.
 James Jones, Defendant. } — CIRCUIT COURT.

The defendant, James Jones, having been duly summoned and failing to answer, it is adjudged by the court —

Commencement of Judgment After Issue.

[Sec. 368.]

John Smith, Plaintiff, }
vs. } Judgment.
 James Jones, Defendant. } — CIRCUIT COURT.

This cause being heard upon the pleadings and evidence, it is adjudged by the court —

Judgment in Action to Enforce Lien on Land.

[Sec. 696, 697, and notes.]

John Smith, Plaintiff, }
vs. } Judgment.
 James Jones, Defendant. } — CIRCUIT COURT.

The defendant, James Jones, having been duly summoned and failing to answer, it is adjudged by the court that the plaintiff, John Smith, recover of the defendant [here insert amount of debt], until paid, and his costs in this action expended. It is further adjudged that to secure said debt, plaintiff has a lien on a tract of land in — county, Kentucky, containing one hundred acres, and bounded as follows [here describe it]; and that so much of said land as may be necessary to satisfy said debt, interest and costs be sold for that purpose [or if the property is indivisible the judgment should direct the sale of the whole of it]. C. T., Master Commissioner of the — Circuit Court, will make said sale at the court-house door, in —, Kentucky, on the first day of some regular term of the circuit or county court for said county, at public outcry, to the highest and best bidder, on a credit of [here insert time] months. He will take from the purchaser bond [or bonds, as the case may be] with good surety for the purchase price, payable to himself, and bearing six per cent interest from date. Before making said sale he will advertise the time, terms and place thereof, and the sum for which it is to be made, together with a description of the property to be sold, by written or printed notices posted up; one at the court-house door aforesaid, and three others at public places in the vicinity of said land, for at least fifteen days just prior to day of sale, and he will also have said property appraised [see Ky. Stat., sec. 2362]. The commissioner is allowed for his services — dollars, to be taxed as costs, and — per cent of amount of debt on day of sale to be taxed as costs [see Ky. Stat., sec. 1740], and will report his action herein to the next term of this court.

Execution may issue for any part of said judgment that remains unpaid by the sale of said property, or execution may issue by plaintiff's order for the whole amount of said judgment before any sale; in which case no sale shall be made of said property until the execution is returned.

APPEALS.**Order Granting from Whole Judgment of Circuit Court.**

[Sec. 734.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Order.

— CIRCUIT COURT.

The defendant, James Jones, prays and is granted an appeal to the Court of Appeals from the judgment rendered herein against him at the present term of this court.

Order Granting From Part of a Judgment of the Circuit Court.

[Sec. 734.]

John Smith, Plaintiff,
vs.
 James Jones, Defendant. } Order.

— CIRCUIT COURT.

The plaintiff, John Smith, prays and is granted an appeal to the Court of Appeals from so much of the judgment, rendered herein against him at the present term, as orders the plaintiff to — [here recite correctly that part of the judgment appealed from].

Supersedeas Bond on Appeal to the Court of Appeals.

[Sec. 748.]

John Smith, Appellant,
vs.
 James Jones, Appellee. } Supersedeas Bond.

— CIRCUIT COURT.

Whereas the appellant, John Smith, has taken [or is about to take] an appeal from a judgment of the — Circuit Court, rendered at its — term, 189—, against him in favor of the appellee, James Jones, for [here insert the judgment or part thereof appellant desires to supersede], and the appellant desires to supersede the said judgment [or the part thereof above mentioned]. Now we, Henry Allen and Sam Kidd, sureties, hereby covenant to and with the appellee, James Jones, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal; also that he will satisfy and perform the said judgment [or the part thereof above recited] appealed from if it should be affirmed, and any order or judgment which the Court of Appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment [and if the appellee is kept out of the use or possession of property the following should be added]; and also pay all rents, hire or damages to property, during the pendency of the appeal, of which the appellee is kept out of possession by reason of the appeal.

Witness our hands, this —, 189—.

SAM KIDD.

Attest: S. J., C. — C. C.

HENRY ALLEN.

[It is not necessary that appellant should sign this bond.]

Supersedeas.

[Sec. 752.]

John Smith, Appellant,
vs.
 James Jones, Appellee. } Supersedeas.

— CIRCUIT COURT.

I do certify that an appeal has been granted by the — Circuit Court from a judgment rendered at its — term, 189—, in favor of James Jones, appellee, against

John Smith, appellant, for [here recite the judgment superseded], and that a supersedeas bond has been executed. Therefore, the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness my hand as clerk of said court, this —, 189—.

S. J., C. — C. C.

Bond on Appeal from Inferior Court to Circuit or Quarterly Court.

[Sec. 724.]

John Smith, Appellant, }
 vs. } — CIRCUIT [OR QUARTERLY] COURT.
 James Jones, Appellee. } Appeal bond.

John Smith, having prayed an appeal to the — Circuit [or Quarterly] Court from the judgment of —, a justice of the peace for — county [or from the judgment of the quarterly court of — county], now we covenant that said John Smith will satisfy and perform the judgment that shall be rendered upon the appeal.

Witness our hands this —, 189—.

WILLIAM HOWARD.

Attest:

SAM KIDD.

[It is not necessary that the appellant should sign this bond.]

Supersedeas on Appeal to Circuit or Quarterly Court.

[Sec. 724.]

John Smith, Appellant, }
 vs. } — CIRCUIT [OR QUARTERLY] COURT.
 James Jones, Appellee. } Supersedeas.

To Harry Allen, Justice of the Peace for — County:

John Smith having taken an appeal to this court from a judgment rendered by you on the first day of —, 189—, in the action of James Jones, plaintiff, against John Smith, defendant, you are, therefore, ordered to stay all proceedings upon said judgment and to transmit to the clerk's office of this court all the original papers in said action.

Given under my hand as clerk [or judge] of said court, this —, 189—

S. J., C. — C. C.

[or S. B., Judge — Q. C.]

Summons on Appeal.

[See form of summons under "Summons and Warning Orders," on page 625.]

FORMS IN CRIMINAL CASES.

SUMMONS.

Summons in Police or Justices' Courts.

[Sections 10, 311, 328.]

JUSTICES' COURT OF — COUNTY [or — Police Court].

The Commonwealth of Kentucky to any Constable of — County [or to the Marshal of —]:

You are commanded to summon John Jones to appear before me [or before the — Police Court], on the first day of —, 189—, to answer the charge [here state offense, and time it was committed, and in what county], and have then and there this writ, with due return how you have executed it.

Given under my hand as justice of the peace of — county [or as judge of said court], this —, 189—

R. P., J. P. — C. [or J. — P. C.]

Summons on Indictment.

[Sec. 146.]

— CIRCUIT COURT.

The Commonwealth of Kentucky to any Sheriff, Coroner, Jailer, Constable, Marshal or Policeman in this State:

You are hereby commanded to summon John Jones to appear in the — Circuit Court on the first day of its next — term, to answer an indictment for misdemeanor found against him in that court.

Given under my hand as clerk of said court, this —, 189—.

S. J., C. — C. C.

Summons on Forfeited Bail-bond.

[Sec. 94.]

— CIRCUIT COURT.

The Commonwealth of Kentucky to the Sheriff of — County:

You are commanded to summon John Jones to appear in the — Circuit Court on the first day of its next — term, to show cause why judgment should not be rendered against him for — dollars, on account of the forfeiture of the bail-bond executed by him for the appearance of Henry Allen in said court to answer an indictment found against him in said court [or for the appearance of Henry Allen before S. B., judge of the — County Court, to answer to the charge of felony committed by said Henry Allen], and have then and there this writ, with due return how you have executed it.

Given under my hand as clerk of said court, this —, 189—.

S. J., C. — C. C.

WARRANTS OF ARREST.**For Offense Within Jurisdiction of Police Courts.**

[Secs. 10, 312.]

— POLICE COURT.

The Commonwealth of Kentucky to the Marshal of — :

You are commanded to arrest John Jones and bring him before the — Police Court on the — of —, 189—, to answer the charge of [here describe charge], committed in the town of — on —, 189—, and have then and there this writ with due return of its execution.

Given under my hand as judge of said court, this — or —, 189—.

R. P., J. — P. C.

Indorsement as to Bail.

[Sec. 28.]

The defendant may give bail in the sum of — dollars, and the bail may be taken by the sheriff [or constable] of — county.

Attest:

R. P., J. — P. C.

Form of Bail Bond. See BAIL.

[The proceedings as to bail in police and city courts are in nearly all cases regulated by the statutes creating the courts.]

For Offense Within Jurisdiction of Justices' Courts.

[Secs. 10, 328.]

The Commonwealth of Kentucky to any Constable of — County:

You are commanded to arrest John Jones, and bring him forthwith before me, or some other magistrate of — county, to answer the charge of [here describe charge], committed in — county, on the — of —, 189—, and then and there have this writ, with due return how you have executed it.

Given under my hand as justice of the peace of said county, this — of —, 189—.

S. A., J. P. — C.

Indorsement as to Bail.

[Sec. 28.]

If a day is fixed in the warrant for the appearance and trial of the defendant, this indorsement should be made on it, viz.: "The defendant may give bail in the sum of \$—, and the bail may be taken by the sheriff [or constable arresting him] of — county."

S. A., J. P. — C.

Attest:

Form of bail-bond. See BAIL.**Warrant of Arrest by Magistrate.**

[Sec. 27.]

The Commonwealth of Kentucky to any Sheriff, Constable, Coroner, Jailer, Marshal or Policeman in this State:

It appearing that there are reasonable grounds for believing that John Jones has committed the offense of [here describe offense], in the county of —, you are

654 CRIMINAL CODE FORMS—SUBPŒNAS—ATTACHMENT FOR WITNESS.

therefore commanded forthwith to arrest John Jones, and bring him before some magistrate of — county, to be dealt with according to law.

Given under my hand as justice of the peace of — county, this — of —, 189—.

S. A., J. P. — C.

Summon as witnesses Sam Kidd and William Dick.

Indorsement on Warrant if Offense Charged is a Misdemeanor.

[Sec. 28.]

The within named John Jones is permitted to give bail in the sum of — for his appearance before me, or the judge of the — County Court, on a day to be fixed in the bail bond, for an examination of the charge, or before the — Circuit Court for trial, on the first day of the term next succeeding the arrest, and the sheriff of the county where he may be arrested, or the sheriff [or constable arresting him] of — county, is authorized to take the bail.

Witness my hand this — of —, 189—.

S. A., J. P. — C.

Form of Bail Bond. See BAIL.

Bench Warrant.

[Secs. 139, 142.]

— CIRCUIT COURT.

The Commonwealth of Kentucky to any Sheriff, Constable, Coroner, Jailer, Marshal or Policeman in this State :

You are hereby commanded forthwith to arrest John Jones, and bring him before the — Circuit Court to answer an indictment in that court against him for felony [or for misdemeanor, as the case may be]; or, if the court be adjourned for the term, that you deliver him to the jailer of — county.

Given under my hand as clerk of said court, this — of —, 189—.

S. J., C. — C. C.

[This form will answer on indictments in police courts.]

Indorsement as to Bail on Bench Warrant.

[Sec. 142.]

The defendant may give bail in the sum of —; and if he desires to give such bail, it may be taken by the sheriff of the county in which he is arrested, or by the sheriff of — county.

Attest:

S. J., C. — C. C.

Form of bail-bond. See BAIL.

Warrant of Arrest Requiring Bond to Keep the Peace.

See SECURITY TO KEEP THE PEACE.

SUBPŒNAS—ATTACHMENT FOR WITNESS.

To Attend Examining Court.

[Sec. 61.]

The Commonwealth of Kentucky to the Sheriff or any Peace Officer of — County :

You are commanded to summon Henry Giles and Tom Davis to appear [here state time] before me, the judge of — County Court, at the court-house in —

[or any other place specifying], to testify on behalf of the plaintiff [or defendant], on the examination of the charge against John Jones of having committed a felony [or misdemeanor].

Given under my hand, this — of —, 189—.

S. B., J. — C. C.

To Attend Trial Court.

[Secs. 150, 315, 329.]

The Commonwealth of Kentucky to the Sheriff of — County :

You are commanded to summon [here insert names] to appear in the — Circuit Court [here state day case is set for trial, or day attendance of witness is desired], to testify on behalf of the plaintiff [or defendant] in the prosecution of the Commonwealth of Kentucky against John Jones.

Given under my hand as clerk of said court, this —, 189—.

S. J., C. — C. C.

[This form will answer in justices' and other courts, with variations to suit the court.]

Subpœna Duces Tecum.

[Secs. 152, 329.]

The Commonwealth of Kentucky to the Sheriff of — County :

You are commanded to summon John Jones, to produce in the — Circuit Court, on the — day of its next — term [here describe the writing or other thing needed as evidence], to be used as evidence on behalf of the plaintiff [or defendant] in the prosecution of the Commonwealth of Kentucky against John Smith.

Given under my hand as clerk of said court, this — of —, 189—.

S. J., C. — C. C.

[This form will answer in justices' and other courts, with variations to suit the court.]

Attachment for Witnesses.

[Secs. 61, 151, 315, 329.]

— CIRCUIT COURT.

The Commonwealth of Kentucky to the Sheriff of — County :

You are commanded to arrest John Jones, and have him before the — Circuit Court on the — of —, 189—, as well to testify on behalf of the plaintiff [or defendant] in a prosecution in said court, between the Commonwealth of Kentucky, plaintiff, and John Smith, defendant, as to answer for disobedience of the subpœna served on him. And you will admit him to bail for his appearance in the sum of — dollars.

Given under my hand as clerk of said court, this the —, 189—.

S. J., C. — C. C.

[This form, with variations to suit the court, will answer in justices' and other courts.]

Bond to be Indorsed on Attachment.

We acknowledge ourselves bound to the Commonwealth of Kentucky in the sum of — dollars, as bail that said John Jones will appear at the time and place named in the within warrant.

Attest :

—, 189—.

JAS. GILES.

HENRY ALLEN.

Recognizance of Witnesses.

[Sec. 69.]

Commonwealth of Kentucky, Plaintiff, } EXAMINING COURT FOR — COUNTY.
 vs. } Recognizance.
 James Jones, Defendant.

Came [here insert names] witnesses for plaintiff, and [here insert names] witnesses for defendant, and in open court severally acknowledged themselves indebted to the Commonwealth of Kentucky in the penal sum of one hundred dollars each, to be void, however, upon their severally appearing in the — Circuit Court, on the first day of its next — term, to testify in the above-named prosecution, and not departing without leave of said court.

Attested by me, as judge of the — County Court [or as justice of the peace of — county], this — of —, 189—.

S. B., P. J. — C. C. [or J. P. — C.]

[This form will answer when witnesses are recognized in the circuit court.]

BAIL.**Bail-bond to Appear Before Magistrate for an Examination of the Charge.**

[Secs. 28, 29.]

John Jones having been arrested under a warrant of arrest for the charge of [here state the charge], and being permitted to give bail in the sum of — dollars, now we, Henry Allen and John Smith, of — county, Kentucky, do hereby undertake that the above-named John Jones will appear before Samuel Allen, justice of the peace of — county [or before S. Bruce, judge of the — County Court], on the — of —, 189—, to answer to the charge in said warrant specified, and then and there surrender himself into custody, and will not thence depart without being lawfully discharged; and if he fail to perform either of these conditions, that we will pay to the Commonwealth of Kentucky the sum of — dollars.

Witness our hands, this —, 189—.

HENRY ALLEN.

JOHN SMITH.

Signed and taken before me, as sheriff of — county.

J. W., S. — C.

Bail-bond to Appear for Trial Without Examination.

[Secs. 28, 29.]

John Jones, having been arrested under a warrant of arrest for the charge of [here state the charge], and being permitted to give bail in the sum of — dollars, now we, Henry Allen and John Smith, of — county, Kentucky, do hereby undertake that the above-named John Jones will appear in the — Circuit Court, on the — of its next — term, to answer said charge, and will at all times render himself amenable to the orders and process of said court in the prosecution of said charge, and, if convicted, will render himself in execution thereof, or if he fail to perform either of these conditions, that we will pay to the Commonwealth of Kentucky — dollars.

Witness our hands, this — 10, 189—.

HENRY ALLEN.

JOHN SMITH.

Signed and taken before me, as sheriff of — county.

J. W., S. — C.

Bail-bond Taken by Examining Court for the Defendant's Appearance in the Examining Court.

[Sec. 55.]

John Jones, having been brought before —, judge of the — County Court [or justice of the peace for — county] for an examination of the charge of [here state charge], and being allowed to give bail for his appearance during the examination of the charge, now we, Henry Allen and John Smith, of — county, Kentucky, do undertake that said John Jones will appear in said examining court at such times and places as shall, from time to time, be specified by said court, and will render himself amenable to all orders of said court in the examination of the charge; and if he fail to perform either of said conditions, we will pay to the Commonwealth of Kentucky — dollars.

Witness our hands, this —, 189—.

HENRY ALLEN.

JOHN SMITH.

Taken and signed before me as judge of the — County Court [or justice of the peace of — county].

S. B., P. J. — C. C. [or J. P. — C.]

Bail-bond for Defendant's Appearance in Court for Trial, Taken by Examining Court, or by a Magistrate or Clerk After Commitment, or by a Sheriff on a Bench Warrant.

. [Secs. 46, 68, 83.]

John Jones, being in custody, charged with the offense of [here state offense], and being admitted to bail in the sum of — dollars, now we, Henry Allen and John Smith, of — county, Kentucky, hereby undertake that the above-named John Jones will appear in the — Circuit Court on the — day of its next — term, to answer said charge, and will at all times render himself amenable to the orders and process of said court in the prosecution of said charge, and, if convicted, will render himself in execution thereof, or if he shall fail to perform either of these conditions, that we will pay to the Commonwealth of Kentucky the sum of — dollars.

Witness our hands, this —, 189—.

HENRY ALLEN.

JOHN SMITH.

Taken and subscribed before me as sheriff of — county [or judge of the — County Court, or justice of the peace of — county, or clerk of the — Circuit Court].

J. W., S. — C. [or P. J. — C. C., or J. P. — C., or C. — C. C.]

Bond Taken in Police or Justices' Court for Appearance in Same Court.

[Secs. 309, 325.]

.— POLICE COURT [OR JUSTICES' COURT OF — COUNTY.]

John Jones, being in custody, charged with the offense of [here state offense], and being admitted to bail in the sum of one hundred dollars, now we, Henry Allen and John Smith, of — county, Kentucky, hereby undertake that the above-named John Jones will appear in the — Police Court [or before the court of —, a justice of the peace of — county] on the — of —, 189—, to answer said charge, and will at all times render himself amenable to the orders and process of said court in the prosecution of said charge, and, if convicted, will surrender him-

self in execution thereof, or if he shall fail to perform either of these conditions, that we will pay to the Commonwealth of Kentucky the sum of — dollars.

Witness our hands, this —, 189—.

HENRY ALLEN.

JOHN SMITH.

Taken and subscribed before me as judge of the — police court [or as justice of the peace of — county], this —, 189—.

SAMUEL ALLEN, J. — P. C. [or J. P. — C.]

Examination of the Bail on Oath.

[Sec. 77.]

John Smith, being sworn and examined as to his qualifications as bail, states that he is a resident of — county, Kentucky; that he is owner of [here describe property] in — county, the title of which is complete and unencumbered, and subject to execution and worth, as he believes, — dollars; also of personal property in said county subject to execution, worth — dollars; that he does not owe more than — dollars; nor is he bound as security for more than — dollars; and that he believes he is worth, over the payment of his debts and liabilities, at least — dollars.

—, 189—.

Sworn to before me as sheriff of — county.

JOHN SMITH.

J. W., S. — C.

Recognizance of Bail.

The Commonwealth of Kentucky }
vs.
 John Smith.

— CIRCUIT COURT.

John Jones and William Smith, of — county, Kentucky, appeared personally in court and acknowledged themselves jointly indebted to the Commonwealth of Kentucky in the sum of — dollars, to be void, however, if John Smith shall appear in the — Circuit Court, on the first day of its next — term [or any day of the same term], to answer the indictment for felony [or misdemeanor], found in said court against him; and shall not depart without leave of the court.

MONEY DEPOSITED IN LIEU OF BAIL.

Entry on the Minutes of the Examining Court of Money Deposited in Lieu of Bail.

[Sec. 56.]

The defendant, John Jones, deposited in the hands of —, sheriff of — county, — dollars in lieu of bail for his appearance before this court for an examination of the charge of his having permitted unlawful gaming in a house of which he was owner, and for his rendering himself amenable to the orders and process of this court in the prosecution of said charge, and for his rendering himself in execution, if convicted.

Entry in Examining Court of the Forfeiture of Money Deposited in Lieu of Bail.

[Sec. 56.]

The defendant, John Jones, having failed to appear in court on this day, to which the examination of the charge against him had been adjourned, it is ordered.

that the money deposited by him with the sheriff of — county in lieu of bail be forfeited, and be paid over to the trustee of the jury fund.

Acknowledgment of Jailer that the Defendant has been Surrendered.

[Secs. 86, 88.]

I, —, jailer of — county, acknowledge that on this day John Jones, who is charged with the offense of [here state offense], and has given bond for his appearance in the — Circuit Court to answer said offense, was surrendered to me by his bail, Henry Allen [or surrendered himself to me], in discharge of said bond.

Witness my hand as jailer of — county, this —, 189—.

M. B., J. — C.

Indorsement by Bail to Have Defendant Arrested.

[Sec. 87.]

We, Henry Allen and John Smith, bail for John Jones, as appears from the within bond [or recognizance], hereby direct the sheriff of — county [or any peace officer, or any person, naming him], to arrest the said John Jones and deliver him to the jailer of — county.

Witness our hands this —, 189—.

HENRY ALLEN.
JOHN SMITH.

Certificate by Trustee of the Jury Fund of Money Deposited in Lieu of Bail.

[Sec. 809.]

I, —, trustee of the jury fund of — county, do certify that John Jones, who is in custody on the charge of larceny, and allowed to give bail in the sum of — dollars for his appearing in the — Circuit Court, on the first day of its next — term, and rendering himself amenable to the orders and process of the said court in the prosecution of said charge, and, if convicted, rendering himself in execution thereof, has deposited in my hand — dollars in lieu of bail.

Given under my hand, this —, 189—.

J. W., T. J. F. — C.

Notice to Attorney for Commonwealth of Application for Return of Money Deposited in Lieu of Bail.

[Sec. 88.]

To —, Esq., Attorney for Commonwealth for — County:

You are hereby notified that John Jones, having deposited with the trustee of the jury fund for — county the sum of — dollars, in lieu of bail, and having surrendered himself to the jailer of — county, and procured from him a certificate of such surrender, a copy of which certificate is served herewith, will, on the — of —, 189—, make application to the — Circuit Court [or to the judge of the — Circuit Court] for the return to him of the said sum of — dollars deposited as aforesaid.

JOHN JONES.

Summons against bail. See SUMMONS.

Execution on forfeited bail-bond. See EXECUTIONS.

PROCEEDINGS IN EXAMINING COURT.

Minutes of Examining Court.

The Commonwealth of Kentucky }
vs.
 John Smith. } — COUNTY, —, 189—.

The defendant, John Smith, having been brought before me, the judge of the — County Court [justice of the peace for — county], charged with the offense of larceny, and being informed of the nature of the charge against him, moved an adjournment of examination until the — day of this month, to procure the aid of counsel and the attendance of witnesses, which motion was sustained; and, in the meantime, he is committed to the jail of — county [or to the custody of the sheriff of — county].

(If the offense be a misdemeanor, or bailable felony, sec. 55, and the defendant desires to give bail, or deposit money in lieu of bail, an entry of the facts should be made on the minutes.)

—, 189—.

The court met pursuant to adjournment, and the defendant was brought from jail. Defendant filed his affidavit, stating that he did not believe he could secure a fair trial before —, judge of the — County Court [or — justice of the peace], the presiding magistrate in this case, and thereupon the said — retired from the case, and —, justice of the peace for — county, having been duly notified, appeared for the purpose of presiding in the case.

The parties being ready, the defendant moved that the witnesses be examined separately; whereupon all the witnesses, except the one under examination, were removed out of hearing of the witness under examination.

John Jones was appointed by me to act as clerk in writing down the testimony of the witnesses.

Thomas Cox being sworn and examined on behalf of the Commonwealth, testified: [Here should follow the testimony of the witnesses.]

The court having heard the evidence and the arguments of counsel, and being satisfied that there are not sufficient grounds to believe that the defendant is guilty of the offense charged, or any other offense, and it is ordered that he be discharged. [Or, the court having heard the evidence and the arguments of counsel, and being satisfied that there are sufficient grounds to believe the defendant is guilty of the offense charged, it is ordered that he be held for trial in the — Circuit Court, and allowed to give bail in the sum of — dollars; and not giving bail, he is committed to the jail of — county.]

The witnesses on behalf of the Commonwealth, — and —, and the witnesses on behalf of the defendant, — and —, entered into recognizances for their appearance in the — Circuit Court. The warrant of arrest (the bail-bond) and recognizances of the witnesses accompany these minutes.

—, J. P. — C.

[If a magistrate be objected to and retire from the case, the magistrate taking his place should sign the minutes.]

COMMITMENT.**Order of Commitment During the Adjournment of the Examining Court.**

[Sec. 55.]

The Commonwealth of Kentucky to the Jailer of — County :

You are commanded to receive — into the jail of — county, and him safely keep until the — of —, 189—, when you will deliver him to the sheriff, or other peace officer of — county, to be brought again before me, for an examination of the charge of larceny, for which he is in custody.

Given under my hand, as judge of the — County Court [or justice of the peace for — county], this — of —, 189—.

S. B., P. J. — C. C. [or J. P. — C.]

Order of Commitment for Trial.

[Sec. 67.]

The Commonwealth of Kentucky to the Jailer of — County :

You are commanded to receive into the jail of — county, —, and him safely keep until discharged by due course of law, he having been held by me, as an examining court, for trial in the — Circuit Court, on the charge of larceny, and allowed to give bail in the sum of — dollars, for default of which he is committed to jail.

Given under my hand, as justice of the peace of — county, this — of —, 189—.

S. B., J. P. — C.

SECURITY TO KEEP THE PEACE.**Warrant of Arrest.**

[Sec. 383.]

The Commonwealth of Kentucky to any Sheriff, Coroner, Jailer, Constable, Marshal or Policeman in this State :

It appearing from the complaint on oath of Henry Allen that John Jones has threatened to commit an offense against his person [or his property], you are therefore commanded to arrest the said John Jones and bring him before me, or some other magistrate of — county, to be dealt with according to law.

Given under my hand as judge of — county, this the — of — 189—.

S. B., J. — C. C.

Bond of Defendant, Taken by a Justice of the Peace.

[Secs. 325, 384, 387.]

John Jones being in custody and required to give bond, in the sum of — dollars, for his appearance in the — Circuit Court on the first day of its next — term, and to keep the peace [or for his good behavior, or both] until said appearance, we, William Graves and Bernard Long, of — county, hereby undertake that the

said John Smith will appear in the — Circuit Court on the first day of its next — term, and will not depart thence without leave of said court; and that until said time he will keep the peace toward all persons in the Commonwealth of Kentucky, and will not be guilty of any offense involving a breach of the peace, nor of any felony; and if he fail to perform either of these conditions we will pay to the Commonwealth of Kentucky the sum of — dollars.

Witness our hands this —, 189—.

WILLIAM GRAVES.
BERNARD LONG.

Taken and signed before me as justice of the peace of — county, this the — day of — 189—.

S. A., J. P. — O.

Bond of Defendant Taken by a Circuit, County or Police Court.

[Secs. 384, 387.]

John Jones being in custody and required to give bond in the sum of — dollars to keep the peace [or for his good behavior, or both] for the period of one year from — 189—, now, we, William Graves and Bernard Long, of — county, hereby undertake that the said John Jones will, during said period, keep the peace toward all persons in the Commonwealth of Kentucky, and that, during said period, he will not be guilty of any offense involving a breach of the peace, nor of any felony; and if he fail to perform either of these conditions, we will pay to the Commonwealth of Kentucky the sum of — dollars.

Witness our hands, this —, 189—.

WILLIAM GRAVES.
BERNARD LONG.

Taken and subscribed before me as clerk of the — Circuit Court [or judge of the — County Court or police judge of —], this —, 189—.

R. P., C. — C. C. [or J. — C. C. or P. J. —.]

Order of Commitment Upon Failure to Give Bond.

[Secs. 384, 387, 398.]

The Commonwealth of Kentucky to the Jailer of — County:

You are commanded to receive into the jail of — county, John Jones, and him safely keep for the period of three months from this day, unless he shall, in the meantime, give security to the Commonwealth of Kentucky in the sum of — dollars for his appearance in the — Circuit Court on the first day of its next — term, and for keeping the peace [or for his good behavior or both], until said appearance [or for keeping the peace, or for his good behavior or both, for the period of one year from this day].

Given under my hand as justice of the peace of — county [or the official title of the committing magistrate or clerk of the Circuit Court], this —, 189—.

HENRY DAVIS, J. P. — C.

Recognizance of Security.

[Sec. 393.]

The Commonwealth of Kentucky }
vs.
John Jones. }

— CIRCUIT COURT.

Came this day William Graves and Bernard Long, and in open court acknowledged themselves jointly indebted to the Commonwealth of Kentucky in the penal sum of — dollars, to be void, however, if John Jones shall keep the peace toward

all persons in the Commonwealth of Kentucky and not be guilty of any offense involving a breach of the peace nor a felony [or be of good behavior], for one year from this date.

[This form will answer in other courts and cases with variations to suit the court and case.]

INDICTMENTS.

No. 1. Indictment for Murder.

[See notes, 60-63 to sec. 122, and Ky. Stat., sec. 1149.]

The Commonwealth of Kentucky	}	— CIRCUIT COURT.
<i>vs.</i> John Smith.		

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of willful murder, committed as follows, viz.: The said John Smith on the — day of —, 189—, in the county aforesaid, did feloniously, willfully and with malice aforethought, kill and murder Thomas Jones, by stabbing him with a knife, or some other edged weapon [or by shooting him with a gun or pistol, or by striking him with an ax or some other heavy weapon, according to the facts], from which stabbing or shooting or striking the said Jones did then and there die [or died within a year and a day thereafter], against the peace and dignity of the Commonwealth of Kentucky.

No. 2. Indictment for Manslaughter.

[See Ky. Stat., sec. 1150.]

The Commonwealth of Kentucky	}	— CIRCUIT COURT.
<i>vs.</i> John Smith.		

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of manslaughter, committed as follows, viz.: The said John Smith on the — of —, 189—, in the county aforesaid, did feloniously and willfully kill Thomas Jones, by stabbing him with a knife, against the peace and dignity of the Commonwealth of Kentucky.

No. 3. Indictment for Rape on Female Over Twelve Years of Age.

[See notes 67, 68 to sec. 122, and Ky. Stat., sec. 1154.]

The Commonwealth of Kentucky	}	— CIRCUIT COURT.
<i>vs.</i> John Smith.		

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of rape upon a female of and above twelve years of age, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, forcibly, unlawfully and against her consent, carnally knew Jane Carnes, a female of and above twelve years of age, against the peace and dignity of the Commonwealth of Kentucky.

No. 4. Indictment for Carnally Knowing a Female Under Twelve Years of Age.

[See notes 67, 68 to sec. 122, and Ky. Stat., sec. 1155.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of carnally knowing a female under the age of twelve years, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, unlawfully and carnally knew Jane Carnes, a female under the age of twelve years, against the peace and dignity of the Commonwealth of Kentucky.

No. 5. Indictment for Robbery.

[See note 70 to sec. 122, and Ky. Stat., sec. 1159.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of robbery, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, did feloniously take a gold watch, the property of Jonathan Spilman, from his person [or in his presence, as the fact may be], and against his will, by putting him in fear of some immediate injury to his person, against the peace and dignity of the Commonwealth of Kentucky.

No. 6. Indictment for Maiming.

[See Ky. Stat., sec. 1165, and 5 R. 238.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of mayhem, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, did unlawfully and feloniously bite off the ear of John Parker, against the peace and dignity of the Commonwealth of Kentucky.

No. 7. Indictment for Assault and Battery.

[Notes 15-17 to sec. 122.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the offense of an assault and battery, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, did maliciously, unlawfully and willfully assault, beat and bruise Lewis Reese, against the peace and dignity of the Commonwealth of Kentucky.

No. 8. Indictment for Burglary.

[See note 22 to sec. 122, and Ky. Stat., sec. 1159.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of burglary, committed as follows, viz.: The said John Smith, on the — day of —, 189—, in the night time, in the county aforesaid, unlawfully and feloniously broke into and entered the dwelling-house of S. M., with intent to commit a felony, against the peace and dignity of the Commonwealth of Kentucky.

No. 9. Indictment for Destroying a Will.

[See Ky. Stat., sec. 1226.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of fraudulently destroying [or concealing, as the case may be] a will, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, fraudulently destroyed [or concealed] the last will and testament of W. M., devising legally his real and personal estate, with the fraudulent intent to prevent the probate thereof, against the peace and dignity of the Commonwealth of Kentucky.

No. 10. Indictment for Arson.

[See notes 11-14 to sec. 122, and Ky. Stat., sec. 1167.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of arson, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, did feloniously, maliciously and willfully set fire to and burn the dwelling-house of Richard Jones, against the peace and dignity of the Commonwealth of Kentucky.

No. 11. Indictment for Attempt at Arson.

[See notes 11-14 to sec. 122, and Ky. Stat., sec. 1172.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of an attempt at arson, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, did feloniously, willfully and maliciously attempt to burn the dwelling-house of Richard Jones, by then and there attempting to set fire to and burn said house, against the peace and dignity of the Commonwealth of Kentucky.

No. 12. Indictment for Perjury.

[See note 66 to secs. 122, 134, and notes; and Ky. Stat., sec. 1173.]

The Commonwealth of Kentucky }
 vs.
 John Smith.

— CIRCUIT COURT.

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of perjury, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, on his examination as a witness, duly sworn by the judge of said court [or the clerk thereof] to testify the truth, on the trial of a civil action in the — Circuit Court, between A. G. Hodges, plaintiff, and James Robb, defendant, concerning the ownership of a certain bay horse—which judge [or clerk] had authority to administer such oath—feloniously, falsely and corruptly testified that he had never heard A. G. Hodges say he was the owner of said bay horse, when in fact and in truth he had frequently heard him say he was the owner of said horse, and the matters so testified being material, and the testimony being willfully and corruptly false, and so known to be by him, the said John Smith, against the peace and dignity of the Commonwealth of Kentucky.

No. 13. Indictment for False Swearing.

[See notes 35–37 to sec. 122, and Ky. Stat., sec. 1174.]

The Commonwealth of Kentucky }
 vs.
 John Smith.

— CIRCUIT COURT.

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of false swearing, committed as follows, viz.: The said John Smith on the — of —, 189—, in the county aforesaid, after having been first duly sworn by the clerk of the — Circuit Court, said clerk having authority to administer an oath to testify to the truth on the trial of an action pending in said court wherein John Jones was plaintiff and Henry Williams, defendant, involving the question as to which of said parties was the owner of a black horse, did falsely, knowingly and willfully testify that he had not seen said Williams buy and pay for said horse, when in fact and in truth said Smith was present when said Williams bought said horse, and did see him buy and pay for said horse, against the peace and dignity of the Commonwealth of Kentucky.

No. 14. Indictment for Bigamy.

[See notes 18–20 to sec. 122, and Ky. Stat., sec. 1216.]

The Commonwealth of Kentucky }
 vs.
 John Smith.

— CIRCUIT COURT.

The grand jury of — county in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of bigamy, committed as follows: The said John Smith on the — of —, 189—, in the county aforesaid, having a wife then living by the name of Mary Smith, whose name before he married her was —, to whom he, the said John Smith, was lawfully married on the — of —, 189—, in the county of — and State of —, did unlawfully marry Jane Grimes, against the peace and dignity of the Commonwealth of Kentucky.

No. 15. Indictment for Grand Larceny.

[See notes 53-56 to sec. 122, and sec. 135; and Ky. Stat., 1194.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith.

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of grand larceny, committed as follows, viz.: The said John Smith on the — of —, 189—, in the county aforesaid, feloniously took and carried away twenty silver spoons [or certain notes issued as currency by the United States, and commonly known as legal tender notes; or certain bank notes issued by banks duly incorporated, and authorized to issue said notes under the laws of the United States, or of the State of —], the personal property of George W. McDonald [or of a person whose name is unknown to the grand jury, if the owner of the property be unknown], of the value of more than twenty dollars, intending to permanently deprive the owner of the possession thereof, against the peace and dignity of the Commonwealth of Kentucky.

No. 16. Indictment for Petit Larceny.

[See notes 53-56 to sec. 122; sec. 135; and Ky. Stat., sec. 1243.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith.

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of petit larceny, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, feloniously took and carried away an ax, the property of Jackson Sparrow, and of the value of less than twenty dollars, against the peace and dignity of the Commonwealth of Kentucky.

No. 17. Indictment for Obtaining Money or Property Under False Pretenses.

[See notes 33-34 to sec. 122, and Ky. Stat., sec. 1208.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith.

The grand jury of — county in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of obtaining money [or property, as the fact may be], under false pretenses, committed as follows, viz.: That said —, on the — of —, 189—, in the county aforesaid, by falsely pretending and representing to — that he was a banker in the city of — and possessed of large pecuniary means, obtained from said — \$— [or property], with intent to commit a fraud upon him; against the peace and dignity of the Commonwealth of Kentucky.

No. 18. Indictment for Embezzlement.

[See note 31 to sec. 122, and Ky. Stat., sec. 1202.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith.

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of embezzling to his own use, bank notes and money, committed as follows, viz.: The said —, on the —

of — 189—, in the county aforesaid, being a servant in the — Bank, at — , a banking corporation created by the laws of Kentucky, did fraudulently convert to his own use — dollars in bank notes issued by the United States as currency and known as legal tender notes; and which said money thus appropriated had been intrusted by —, the cashier of said — Bank, to said —, who was a servant in the employment of said bank at that time, to be taken from said — Bank in —, to be deposited by him to the credit of — in the — Bank, against the peace and dignity of the Commonwealth of Kentucky.

No. 19. Indictment for False Personation.

[Ky. Stat., sec. 1209.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the offense of falsely and fraudulently personating another person, committed as follows, viz.: The said — on the — of — 189—, in the county aforesaid, falsely and fraudulently represented himself to be —, and in such assumed character married —, against the peace and dignity of the Commonwealth of Kentucky.

No. 20. Indictment for Counterfeiting Coin.

[See note 27 to sec. 122, and Ky. Stat., sec. 1181.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of counterfeiting committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, did counterfeit a — coin of the United States, known as a —, which was then passing as current in the Commonwealth of Kentucky, with intent to defraud, against the peace and dignity of the Commonwealth of Kentucky.

No. 21. Indictment for Having in Possession Counterfeit Money.

[See note 27 to sec. 122, and Ky. Stat., sec. 1193.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of unlawfully having in his possession counterfeit bank notes, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, had in his possession — counterfeit bank notes of the — Bank of —, each of the denomination of — dollars, and each payable on demand at the office of said bank in —; the genuine notes of said bank being at that time current in this State, and which said notes thus in the possession of said John Smith were known to him to be counterfeit, and were held by him with intent to defraud, by uttering and passing said counterfeit bank notes as true and genuine notes, against the peace and dignity of the Commonwealth of Kentucky.

No. 22. Indictment for Forgery.

[See notes 38-40, sec. 122, sec. 133, and Ky. Stat., sec. 1185.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of forgery committed as follows, viz.: The said John Smith, in the county aforesaid, on the — of —, and before the finding of this indictment, did, without the knowledge or consent of James Jones and with the intent to defraud, sign the name of said Jones to a due bill in words and figures as follows [here set out the writing in full], against the peace and dignity of the Commonwealth of Kentucky.

No. 23. Indictment for Uttering a Forged Writing.

[See notes 38-40, sec. 122, sec. 133, and Ky. Stat., sec. 1185.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of uttering a forged writing, committed as follows, viz.: The said John Smith did in the county aforesaid, on the — of —, 189—, and before the finding of this indictment, deliver to James Jones a writing in words and figures, as follows, to-wit [here insert copy of writing], which writing purported to have been signed by one Bland Haydon, and said Smith stated to Jones when he delivered him said writing that said Haydon had signed his name thereto, and on the faith of said statement said Smith obtained from Haydon — dollars. When at the time Smith delivered said — and made said statement he knew it was false and knew that said Haydon had not signed his name to said —, and that his name had been forged and counterfeited and that it was not his signature, and said paper was delivered and said representations made with the intent to defraud said Haydon, against the peace and dignity of the Commonwealth of Kentucky.

No. 24. Indictment for Malicious Shooting.

[See note 85, sec. 122, and note 8, sec. 154, and Ky. Stat., sec. 1186.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the crime of willful and malicious shooting, with intent to kill, committed in manner and form as follows, viz.: The said John Smith, on the — of —, 189—, and before the finding of this indictment, did, in the county aforesaid, willfully and maliciously shoot and wound one James Bennett with a pistol loaded with leaden bullet, and with the intention to kill him, from which shooting the said Bennett did not die, against the peace and dignity of the Commonwealth of Kentucky.

No. 25. Indictment for Cutting in Sudden Heat and Passion.

[See note 85, sec. 122, and Ky. Stat., sec. 1242.]

The Commonwealth of Kentucky } — CIRCUIT COURT.
vs.
 John Smith. }

The grand jury of — county, in the name and by the authority of the Com-

monwealth of Kentucky, accuse John Smith of the offense of cutting, in sudden heat and passion, committed in manner and form as follows, viz.: The said John Smith, in the county aforesaid, on the — of —, 189—, and before the finding of this indictment, did, in sudden heat and passion and not in self-defense, cut with a knife one James Bennett without killing him, against the peace and dignity of the Commonwealth of Kentucky.

No. 26. Indictment for Selling Liquor Without License.

[Ky. Stat., sec. 1304.]

The Commonwealth of Kentucky }
 vs.
 John Smith. } — CIRCUIT COURT.

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the offense of selling liquor without license, committed in manner and form as follows, viz.: The said John Smith, in the county aforesaid, on the — of —, 189—, and before the finding of this indictment, did sell and dispose of to John Jones spirituous, vinous and malt liquors and mixtures thereof, and this without license so to do, against the peace and dignity of the Commonwealth of Kentucky.

No. 27. Indictment for Carrying Concealed a Deadly Weapon.

[See note 83 to sec. 122; and note 5 to sec. 124; and Ky. Stat., sec. 1300.]

The Commonwealth of Kentucky }
 vs.
 John Smith. } — CIRCUIT COURT.

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the offense of carrying concealed upon and about his person a deadly weapon, committed as follows, viz.: The said John Smith, on the — of —, 189—, in the county aforesaid, did unlawfully carry concealed upon and about his person a deadly weapon other than an ordinary pocket knife, to-wit, a pistol, against the peace and dignity of the Commonwealth of Kentucky.

No. 28. Indictment for Selling Liquor to a Minor.

[See notes 71, 72, to sec. 122; and Ky. Stat., sec. 1306.]

The Commonwealth of Kentucky }
 vs.
 John Smith. } — CIRCUIT COURT.

The grand jury of — county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Smith of the offense of furnishing spirituous liquors to a minor not his own child, committed as follows, viz.: The said John Smith did, on the — of —, 189—, in the county aforesaid, unlawfully sell, lend and give spirituous liquors, viz.: Whisky and mixtures of same to John Speed, a person then under twenty-one years of age, other than his own child; and without special written directions so to do, specifying the said John Speed and the quantity to be furnished to him, from the father or guardian of said minor, against the peace and dignity of the Commonwealth of Kentucky.

PLEADINGS OF THE DEFENDANT.

[Secs. 164, 172.]

Demurrer.

**The Commonwealth of Kentucky, Plaintiff, }
vs. }
John Smith, Defendant. }**
The defendant demurs to the indictment.

Plea.

The Commonwealth of Kentucky, Plaintiff,
vs.
John Smith, Defendant.

The defendant pleads that he is guilty of the offense charged in the indictment.

OR

The defendant pleads that he is not guilty of the offense charged in the indictment.

OR

The defendant pleads that he has been acquitted of the offense charged in the indictment, by the judgment of the — Circuit Court, rendered on the — of —, 189— [or by judgment of the — Court, a court having jurisdiction to try the defendant for said offense, rendered on the — of —, 189—].

OR

The defendant pleads that he has been convicted of the offense charged in the indictment, by the judgment of the — Circuit Court, rendered on the — of —, 189— [or by judgment of the — Court, a court having jurisdiction to try the defendant for said offense, rendered on the — of —, 189—].

ORDERS OF COURT.

Order for Process on Indictments.

[Sec. 141.]

Commonwealth of Kentucky, Plaintiff,
vs.
 John Smith, Defendant. } —CIRCUIT COURT.

It is ordered that a bench warrant issue for the arrest of the defendant, allowing him to give bail in the sum of — dollars.

OR [if the offense be not bailable]

It is ordered that a bench warrant issue for the arrest and committal to jail of the defendant.

OR

It is ordered that a summons issue on the indictment herein.

Order for a Bench Warrant After the Defendant Has Given Bail.

[Sec. 99.]

Commonwealth of Kentucky, Plaintiff, }
vs.
 John Smith, Defendant. }

— CIRCUIT COURT.

It appearing that the defendant has failed to appear in pursuance of the undertaking of his bail [or that the bail taken herein is insufficient, or that the offense for which defendant is indicted is not bailable], it is ordered that a bench warrant issue for the arrest of the defendant, allowing him to give bail in the sum of — dollars [or that a bench warrant issue for the arrest and committal to jail of the defendant, if the offense be not bailable.]

Order Upon Ascertaining the Defendant's True Name.

[Sec. 125.]

Commonwealth of Kentucky, Plaintiff, }
vs.
 John Smith, Defendant. }

— CIRCUIT COURT.

It appearing to the satisfaction of the court that the defendant's name is John Jones, it is ordered that the further proceedings in this case shall be in defendant's true name of John Jones, indicted by the name of John Smith.

Order Setting Aside an Indictment and Ordering Case Resubmitted.

[Sec. 150.]

Commonwealth of Kentucky, Plaintiff, }
vs.
 John Smith, Defendant. }

— CIRCUIT COURT.

The defendant moved the court to set aside the indictment, on the ground that the grand jury had been illegally summoned and impaneled [or other ground, according to the facts], and the court being sufficiently advised, it is ordered that the indictment be set aside, and the charge against the defendant be submitted to another grand jury, and the defendant be committed to jail to await the action of such grand jury [or that the defendant be admitted to give bail in the sum of — dollars, for his appearance to answer the charge].

Order for the Removal of the Defendant to Another Court, on its Appearing That the Offense was Committed Within the Jurisdiction of Such Court.

[Secs. 166, 167, 230.]

Commonwealth of Kentucky, Plaintiff, }
vs.
 John Smith, Defendant. }

— CIRCUIT COURT.

It appearing to the satisfaction of the court, that the offense charged in the indictment was committed in — county, it is ordered that the jury herein be discharged, and that the clerk transmit to the clerk of the — Circuit Court a copy of the indictment and of this order, and also all the original papers of the prosecution, including the bail bond (if any), and that the sheriff carry and deliver the defendant, with a copy of this order, to the jailer of — county [or, that the defendant be required to appear in the — Circuit Court, to answer the charge (*if he have given bail*), or that the defendant be allowed to give bail in the sum of — dollars, for his appearance in the — Circuit Court, to answer the charge].

Order Upon Its Appearing that the Offense was Committed in Another State.

[Sec. 231.]

The Commonwealth of Kentucky, Plaintiff, } — CIRCUIT COURT.
 vs.
 John Smith, Defendant. }

It appearing to the satisfaction of the court, that the offense charged in the indictment was committed in the State of —, it is ordered that the jury herein be discharged, and that the defendant be committed to jail to await a requisition for him by the governor of —, and the Commonwealth's attorney is directed to give information hereof to the governor of —; but, if no requisition be made for the defendant before the first day of —, 180—, he shall be discharged from jail.

Judgment if the Punishment be Death.

[Sec. 290.]

The Commonwealth of Kentucky, Plaintiff, } — CIRCUIT COURT.
 vs.
 John Smith, Defendant. }

The defendant was this day brought into court, and being informed of the nature of the indictment, plea and verdict, was asked if he had any legal cause to show why judgment should not be pronounced against him; and none being shown, it is adjudged by the court that the defendant be taken to the jail of — county, and there safely kept until the — of —, 180—, on which day, between sunrise and sunset, the sheriff of — county shall hang him by the neck until he is dead.

Judgment if the Punishment be Confinement in the Penitentiary.

[Sec. 284.]

The Commonwealth of Kentucky, Plaintiff, } — CIRCUIT COURT.
 vs.
 John Smith, Defendant. }

The defendant was this day brought into court, and being informed of the nature of the indictment, plea and verdict, was asked if he had any legal cause to show why judgment should not be pronounced against him; and none being shown, it is adjudged that the defendant be taken, by the sheriff of — county, to the State penitentiary, and there confined at hard labor for the period of — years.

Judgment for Fine and Imprisonment.

[Sec. 291, and Ky. Stat., sec. 1377.]

The Commonwealth of Kentucky, Plaintiff, } — CIRCUIT COURT.
 vs.
 John Smith, Defendant. }

The jury impaneled herein returned the following verdict: "We, of the jury, find the defendant guilty and affix his punishment at a fine of — dollars and confinement in the county jail for six months. J. Dudley, Foreman." Wherefore, it is adjudged that the plaintiff recover of the defendant the sum of — dollars and the costs of this prosecution, and that the defendant be confined in the jail of — county for the period of six months; and when said period of confinement shall have terminated the defendant shall be retained in confinement until the fine aforesaid be paid, but the period of such confinement for the non-payment of the fine shall not exceed one day for each two dollars of the fine.

Judgment of Removal from Office for Malfeasance in Office.

[Sec. 292.]

The Commonwealth of Kentucky, Plaintiff,
vs.
 John Smith, Sheriff of — county, Defendant. } — CIRCUIT COURT.

It appearing by the verdict that the defendant has been guilty of an offense which creates a forfeiture of his office of sheriff of — county, it is adjudged that the defendant be removed from his office of sheriff of — county, and said office is hereby adjudged to be vacant by said removal.

[If any other punishment be affixed to the offense, judgment for that punishment should precede the judgment of removal.]

BILL OF EXCEPTIONS.

See form of and rules for preparing, pages 645, 646.

APPEALS TO THE COURT OF APPEALS.

Order Noting the Prayer for an Appeal, in Cases of Felony, by the Defendant.

[Sec. 336.]

The Commonwealth of Kentucky, Plaintiff,
vs.
 John Smith, Defendant. } — CIRCUIT COURT.

The defendant prayed an appeal from the judgment herein to the Court of Appeals, which is granted, and, on motion of the defendant, it is ordered that the execution of the judgment herein be suspended for the period of sixty days from the date of said judgment, [or until sixty days after his bill of exceptions shall be signed and made part of the record, if time have been given to file a bill of exceptions.]

Order Noting Prayer for Appeal, in Cases of Felony, by Commonwealth.

[Sec. 337.]

The Commonwealth of Kentucky, Plaintiff,
vs.
 John Smith, Defendant. } — CIRCUIT COURT.

The plaintiff prayed an appeal from the decision of court rendered herein, instructing the jury that they should find for the defendant [reciting the decision from which the appeal is prayed; or if from the final judgment, the form is the same as is given for the defendant.]

Certificate of the Appeal Being Taken in Cases of Felony.

[Sec. 336.]

John Smith, Appellant,
vs.
 The Commonwealth of Kentucky, Appellee. } COURT OF APPEALS OF KENTUCKY.

I, —, clerk of the Court of Appeals of Kentucky, do certify that John Smith has this day taken an appeal in the manner and form prescribed by law, from a

judgment of the — Circuit Court, rendered at its — term, 189—, in the case of the Commonwealth of Kentucky, plaintiff, against John Smith, defendant, for the confinement of the defendant in the State penitentiary at hard labor for the period of — years; it is therefore ordered that the execution of said judgment be suspended.

Witness my hand, this — of —, 189—.

—, CLERK C. A.

Order Granting an Appeal in Cases of Misdemeanor.

[Sec. 348.]

The Commonwealth of Kentucky, Plaintiff, } — CIRCUIT COURT.
vs.
 John Smith, Defendant. }

The defendant prayed an appeal from the judgment herein to the Court of Appeals, which is granted, upon condition that he lodge in the clerk's office of said court a transcript of the record in sixty days from the date of the judgment.

[The same form may be used if the appeal be prayed by the plaintiff.]

Supersedeas Bond in Cases of Misdemeanor.

[Sec. 349.]

The Commonwealth of Kentucky, Plaintiff, } — CIRCUIT COURT.
vs.
 John Smith, Defendant. }

The defendant, John Smith, having prayed an appeal from the judgment of the — Circuit Court, rendered herein against him at its — term, 189—, for a fine of — dollars and costs, and imprisonment in the jail of — county for — months, now we covenant to and with the plaintiff that if said judgment be affirmed, we will pay said fine and costs, and all damages thereon, and the costs of the appeal, and that the defendant will surrender himself in execution of the judgment of imprisonment; or, if he fail to do so, that we will pay to the plaintiff two dollars for each day of the imprisonment adjudged.

Witness our hands, this —, 189—.

JOHN SMITH.

THOMAS JONES.

GEORGE SMITH.

Taken and subscribed before me, as clerk of the — Circuit Court, this — of —, 189—.

S. J., C. — C. C.

[It is not necessary that the defendant should sign this bond.]

Supersedeas in Cases of Misdemeanor.

[Sec. 349.]

John Smith, Appellant, } COURT OF APPEALS OF KENTUCKY.
vs.
 The Commonwealth of Kentucky, Appellee. }

I, —, clerk of the Court of Appeals of Kentucky, do certify that the appellant, John Smith, has taken an appeal from the judgment of the — Circuit Court, rendered at its — term, 189—, in favor of the Commonwealth of Kentucky, against him for a fine of — dollars and costs, and for his imprisonment in the — county jail for — months, and has executed a supersedeas bond agreeably to law, a transcript of which, and of the record, has been filed in my office. Therefore, the execution of said judgment is suspended.

Given under my hand, this —, 189—.

—, C. C. A.

APPEALS TO CIRCUIT COURTS.

Appeal Bond.

[Sec. 364.]

John Smith, Appellant,

vs.

The Commonwealth of Kentucky, Appellee. }

— CIRCUIT COURT.

John Smith having prayed an appeal to the — Circuit Court, from the judgment rendered, on the — of —, 189—, by —, a justice of the peace of — county, against said appellant for a fine of — dollars and costs; now if said judgment be affirmed, we covenant to pay the costs of the appeal.

Witness our hands, this — of —, 189—.

THOMAS JONES.

GEORGE SMITH.

Taken and subscribed before me, as clerk of the — Circuit Court, this — of —, 189—.

S. J., C. — C. C.

Appeal and Supersedeas Bond.

[Sec. 364.]

John Smith, Appellant,

vs.

The Commonwealth of Kentucky, Appellee. }

— CIRCUIT COURT.

John Smith having prayed an appeal to the — Circuit Court, from the judgment rendered, on the — of —, 189—, by —, a justice of the peace for — county, against said appellant for a fine of — dollars and costs, now, if said judgment be affirmed, we covenant to pay the costs of appeal; and also that the said John Smith will perform the judgment which shall be rendered against him on the appeal, and if the judgment be for imprisonment, and said John Smith fail to surrender himself in execution thereof, that we will pay to the Commonwealth of Kentucky the sum of two dollars for each day of imprisonment adjudged against him.

Witness our hands, this — of —, 189—.

THOMAS JONES.

GEORGE SMITH.

Taken and subscribed before me, as clerk of the — Circuit Court, this — of —, 189—.

S. J., C. — C. C.

Supersedeas.

[Sec. 364.]

John Smith, Appellant,

vs.

The Commonwealth of Kentucky, Appellee. }

— CIRCUIT COURT.

I do certify that John Smith has prayed an appeal to the — Circuit Court, from a judgment rendered on the — of —, 189—, by —, a justice of the peace for — county, against him for a fine of — dollars and costs, and has duly executed an appeal and supersedeas bond. Therefore, the execution of said judgment is suspended

— Given under my hand, as clerk of said court, this — of —, 189—.

S. J., C. — C. C.

Certificate of Appeal.

[Sec. 364.]

John Smith, Appellant,

vs.

The Commonwealth of Kentucky, Appellee. }

— Circuit Court.

I do certify that John Smith has taken an appeal to the — Circuit Court, from a judgment rendered on the — of —, 189—, by —, justice of the peace for — county, against him for a fine of — dollars and costs.

Given under my hand, as clerk of said court, this — of —, 189—

S. J., C. — C. C.

CAPIAS PRO FINE.**Execution Upon Judgment of Circuit Court in Penal Prosecution.**

[Sec. 301.]

The Commonwealth of Kentucky to the Sheriff of — County:

We command you to take the body of —, late of said county, if he be found within the same, and him safely keep until he shall satisfy us — dollars, which we, late in our circuit court, recovered against him for a fine assessed against him for [giving the offense as charged in the indictment] against our peace and dignity; also, the sum of — dollars, which to us in the same court was adjudged for our costs in that behalf; whereof the said — is convict, as appears to us of record; and how you shall have executed this writ make known to our judge of our said court, at the court-house thereof, in the city of —, on the — of —, 189—, and have then there this writ

Witness S. J., clerk of our said court, at the court-house aforesaid, this — of —, 189—. S. J., C. — C. C.

Execution for a Fine Upon a Judgment of a Justice of the Peace.

[Sec. 333.]

The Commonwealth of Kentucky to any Constable of — County:

You are commanded to take the body of Charles Bell, late of said county, and him safely keep until he shall satisfy the said Commonwealth the sum of — dollars, which the said Commonwealth recovered before me, as justice of the peace for said county, for a fine for a breach of the peace [or other offense, as the case may be]; also, the sum of — dollars, which to the said Commonwealth before me was adjudged for her costs in that behalf expended; whereof the said Charles Bell is convict, as appears to me of record; and that you make due return hereof in sixty days to me at my office. Given under my hand, this — of —, 189—.

W. E., J. P. — C.

Execution Against Property and on Replevin Bond.

[Secs. 301, 302, 303.]

See EXECUTIONS, page 638.

HABEAS CORPUS.**Writ of Habeas Corpus.**

[Sec. 402.]

The Commonwealth of Kentucky to Lewis Jackson, of the County of —.

We command you, that you have the body of Willis Strother, detained in your custody, as it is said, together with the day and cause of his being taken, at the court-house of the county in which this writ was served, before the circuit judge of said county, on —, the — of —, 189—, at the hour of nine o'clock of the forenoon of said day; and that you then and there state in writing the cause of detaining the said Willis Strother, and produce your authority for so doing; and hereof you are not to fail, under the penalties denounced by law against those who disobey this writ, and to submit to and receive all those things which shall then and there be adjudged in this behalf.

Witness my hand, as police judge of the town of —, this — of —, 189—. R. P., P. J. —.

Indorsement Changing the Time for Return to the Writ.

[Sec. 403.]

COMMONWEALTH OF KENTUCKY, COUNTY OF —.

The within writ having been served this day, but at such time as renders it impossible for Lewis Jackson to obey the same at the time therein specified, the time for said Jackson to produce the body of Willis Strother, and make return to said writ, is changed from the — of —, 189—, to the — of —, 189—, at ten o'clock in the forenoon.

J. W., S. — C.

Notice of the Change of Time for Return to the Writ, to be Given to the Person on Whose Application it is Issued.

[Sec. 408.]

Robert Calvert, Esq.:

You are hereby notified that the time for the return to the writ of *habeas corpus* issued on your application, in behalf of Willis Strother, against Lewis Jackson, has been changed from the — of —, 189—, to the — of —, 189—, at ten o'clock A. M., as appears from the indorsement made by me upon said writ, of which the following is a copy, viz.: [here copy the indorsement].

J. W., S. — C.

Bond that the Person Detained Shall Not Escape, and for Payment of Costs.

[Sec. 404.]

A writ of *habeas corpus* having been applied for in behalf of Willis Strother, said to be unlawfully detained by Lewis Jackson, we, Thomas Smith and Samuel Johnson, hereby covenant with the Commonwealth of Kentucky, in the penal sum of \$—, that said Willis Strother shall not escape while he is being brought to the place at which he is commanded to be produced by said writ, and if he so escapes we will pay to the Commonwealth of Kentucky the said sum of \$—. And we

further agree to pay such costs and charges as may be lawfully awarded against the said Willis Strother, upon the trial under said writ.

Witness our hands, this — day of —, 189—.

THOMAS SMITH.

SAMUEL JOHNSON.

Taken and subscribed before me, as police judge of the town of —, this — of —, 189—.

R. P., P. J. —.

Attachment Against Person Refusing Obedience to Writ.

[Sec. 409.]

The Commonwealth of Kentucky to any Sheriff, Coroner, Constable, Jailer, Marshal or Policeman in this State:

You are commanded forthwith to arrest Lewis Jackson, and bring him at once before me to answer for disobedience in refusing to obey the writ of *habeas corpus* lately served upon him, requiring him to bring before the circuit judge of — county, at the court-house in —, the body of Willis Strother, and then and there have this writ, with due return how you have executed it.

Given under my hand, as police judge of —, this the — of —, 189—.

R. P., P. J. —.

INDEX TO CIVIL CODE.

	SECTION.		SECTION.
Abatement—		Actions—	
Error as to form of action not cause for	8	Absent defendant against	58, 408
On judgment before debt matures, sub. 3,	247	deemed before court, when	60
Abolished—		Alimony for	420
Trial of right of property under sheriff	659	venue of	76
Writ of injunction	271	Assignee by	19
<i>Ne exeat</i>	688	Assignment, pending	20
<i>Quo warranto</i>	480	Bail, against	172
<i>Scire facias</i> against bail	179	Bank, against	71
Absconding debtor—		Bill of exchange, on	19, 26
Attachment of property of	194	Board of education, against	68
Absence from Kentucky—		Cause of stricken from pleading 84,	371
Four months authorizes attachment, sub. 2	194	Charter to vacate	480
authorizes warning order, sub. 4	57	to repeal	480
Plaintiff's affidavit proof of, unless controverted, sub. 6	58	Check on	19, 26
Absent defendant—		Code applies to all	16
Attachment of property of	194	Commencement of	39
See CONSTRUCTIVE SERVICE.		Committed by	21
See NON-RESIDENTS.		Common carrier, against	73
Accident—		Contractor for public work, against	77
Ground for new trial, sub. 3	340	Contracts, on	26, 27
Account—		successive, on	686
Copy of to be filed with pleading	120	Corporations generally, against	72
Settlement of accounts of fiduciaries	471	Counter-claim is, sub. 34	732
Testimony concerning, against decedent, sub. 7	606	Cross-action in action to enforce lien	692
Account book—		Curator, by	21
Testimony as to entries in, sub. 7	606	Defendant constructively summoned, against	75
Acknowledgment—		Debt, before maturity of	237
Subpœna, equivalent to service	533	Decedents' estate, to settle	65, 428
Summons, equivalent to service	50	distribute	66
Action for money—		partition	66
Includes, what? sub. 8	732	sell	66
		Discovery, for	685
		Dismissal for want of parties	28, 371
		by court	113, 371
		of part of	84
		without prejudice	371
		Division of lands	499
		Divorce, for	76, 420
		Dower, to allot	499
		Election of causes of	85
		Embraces, what, sub. 34	732
		Equitable, when to be	6
		Error as to form of, how corrected	8, 9
		Executor, against	21
		Fiduciaries generally, by	21
		Fine, to recover	63
		Form of	4
		Franchise, to prevent usurpation of	490
		Garnishees, against	227

Actions—Continued.

	SECTION.
Guardian, against	67
by	21
Idiot, by	35
against	36
real estate of, to sell	489
Infant, by	35
against	36
real estate of, to sell	489
Injury to character, for	74
person	74
Inmate of asylum, against	69
Insurance company, against	71
Joinder, of causes of	83, 113
Joint owners, for sale of property of	490
Judgment to enforce	70
Justices' courts, in	700
Land, to recover	125
divide	499
lien on, to enforce	125, 692
Libel, for	123
Lien to enforce	692, 694
Lost writing, on	7
Lunatic, by	35
against	36
real estate of, to sell	489
Married woman, by and against	34
Meaning of word, action, sub. 34	732
Misjoinder of, how corrected	85
Money for, includes damages, sub. 8,	732
Name in which to be brought	18
Negotiable instruments on	26
New parties in	28
New trial for	520
Non-resident against	408
"No property found," on	70, 439
Numerous parties, by or against, some for all	25
Office, to prevent usurpation of	480
Officer, against	63
Order, on	19, 26
Ordinary, when to be	5, 6
Parties jointly bound, against	27
generally against	26
interested to be joined	24
numerous, by or against, some for all	25
Party in interest, to be in name of	18
Penalty, to recover	63
Personal property, to recover	180
Personal representative, against	21
Police courts in	700
Prisoner, against	69
Promissory note, on	19, 26
Property distrained, to recover	33
Quarterly courts, in	700
Railroad, against	73
Real property, to recover, venue	62
Remainders, to sell	491
Removal of to U. S. Courts, page 580 defendant, after commencement of, effect	82
Reversions, to sell	491
Revivor of	500

Actions—Continued.

	SECTION.
Sale of property for debt	694
joint owners, sale of property of	490
persons under disability of	489
Settlement of estates of decedents	428
trust estates	438
Set-off is action, sub. 34	732
Slander, for	123
Special proceedings are, sub. 34	732
Striking out cause of	84, 85
all or part of	113, 371
Surety by after maturity of debt 661, against	693
Transfer of, to proper docket	8
court may	10
defendant may move to	10
from one court to another	13
jury trial for	11, 12
Trustee, by	21
United States Courts, to, page 580	
Unknown defendant, against	408, 691
Unnecessarily multiplied, plaintiff to pay costs	687
Venue of. See VENUE OF ACTIONS.	
Witness against, when not allowed	542
Writing, lost or mutilated, on	7

Acts—

Mode of counting days between	681
Performance of, by a majority	679
Private of Legislature, how pleaded	119

Actual service—

See SUMMONS	47
-----------------------	----

Adjournment—

Taking of depositions concerning	568, 570
--	----------

Administrator—

See REPRESENTATIVE.	
---------------------	--

Admission—

Express not necessary in plea of avoidance or estoppel, sub. 6	113
Failure of non-resident to deny allegation is when	409
of party to deny allegations is	126
to deny statements in petition for divorce is not	423
Genuineness of writings filed, when admitted	527
Offer to confess judgment is not	640

Admonition—

Jury to, before separation	320
--------------------------------------	-----

Adverse party—

May be required to testify, when	149, 606
--	----------

	SECTION.		SECTION.
Advertisement—		Affirmance—	
Creditors to, in action to settle es-		Damages on, when superseded . . .	764
tates	430, 431	Proceedings on, in court below . .	761
in action to settle trust estate . .	438		
Sales, made under order of court .	696	Affirmation—	
attached property of	218	Includes oath, sub. 23	732
		Person may make in place of oath .	680
Affiant—			
Obtaining provisional remedy, may		Affirmative—	
be examined	548	Party holding must prove it	525
Affidavits—		Agent—	
Affiant obtaining provisional rem-		Affidavit of, generally	550
edy may be examined	548	to verify pleadings	117
Agent may make	550	warning order for	58
Agreed case; affidavit as to . . .	637	Chief agent of corporation, sub. 33,	732
Amendment of, in attachment . . .	268	Notice, service of on	625, 628
Arrest and bail. See ARREST AND		Summons may be served on, when .	51
BAIL	152	Warning order, on affidavit of . . .	58
motion concerning bail in cases of	178		
Attachment. See ATTACHMENT . .	194	Agreed case—	
before sale of real property under	230	Judgment in	639
grounds of, controverted by . . .	263	Record of, what constitutes	638
Attorney may make, when	550	Submission of to court	637
Before whom made in State	549		
out of State	549	Alimony—	
Bill of exceptions attested by . . .	387	Action for, in equity	420
Claims against decedents' estates to	437	Interrogatories concerning property	421
Claim and delivery. See CLAIM AND		Maintenance allowed pending ac-	
ATTACHMENT	181	tion	424
Clerk may take	671	Pleadings need not be verified . . .	421
Constructive service. See CON-		Venue of action for	76
STRUCTIVE SERVICE	58	Wife may sue alone	34
Continuance for	315		
Decedents' estate, claim against .	437	Allegations—	
Definition of	544	Admitted, if not denied	126
Evidence by	543	Alternative allowed, sub. 4	113
Evidence, to petition to perpetuate	610	Amendment of	134
Examination of person making . .	548	party in fault to pay costs, sub. 5,	113
Exceptions, bill of, attested by . .	337	without verification	139
Forms of, page 627.		Inconsistent, to be stricken out,	
Holiday may be made on	664	sub. 4,	113
How made	551	Indefinite or uncertain, amendment	
Injunction to obtain	273	of	134
read on application for	277	Irrelevant or redundant, stricken	
on trial of, to be filed	287	out	121
Judgment in proceedings to va-		Insertion of, allowed	134
cate	520	Material, what are	127
New trial, on motion for	343	Non-resident against, when taken	
Officers before whom made	549	as true	409
out of State	549	Traverse of, necessary	126
Purposes for which may be used . .	547	defined, sub. 7	113
Subpoena, proof of service of . . .	533	Verification at any time before trial	137
Subscription of by affiant	551	waiver of objection for want of .	116
Summons, proof of service of . . .	47		
Sureties in bonds to make	683	Allotment of dower—	
Trust estates, claim against	438	Provisions as to	499
Verification of, pleadings by . . .	116, 117		
Warning order for	58		
Witness, to secure personal attend-			
ance of	556		

	SECTION.		SECTION.
Allowance—		Amendments to Code, and acts—Continued.	
Wife to pending action for alimony or divorce	424	Clerk may grant attachment in cer- tain actions	236
Alternative pleadings—		may grant order of arrest in cer- tain actions	239
When allowed, sub. 4	113	Commonwealth not required to exe- cute bond to non-resident . .	411
Amendment—		Contract, variance between pleading and proof	131
Affidavit to obtain attachment, sub. 2,	268	Corporations, damages against on appeal	764
Bond, defective	682	service of summons on (3 amd) .	51
Continuance upon	136	Damages against corporations on affirmance of appeal	764
Costs paid by party in fault, sub. 5, after demurrer sustained	94	Depositions may be retaken in re- buttal without leave	553
Defective pleading to cure	134	in divorce cases, how may be taken	574
Demurrer after	94	to be used out of this State . . .	591
Depositions, certificate to, sub. 3 .	588	Divorce, how depositions in may be taken	574
Discretion of court in allowing . .	134	proof of statements of petition .	422
Errors in pleading, cured by . . .	134	Error, assignment of not required .	737
Error as to form of action corrected by	8	must be substantial to authorize reversal	756
Mistake in pleading corrected by .	134	Exceptions, bill of, time to pre- pare	334, 337
Name of party to correct	134	Failure of proof, what not to be deemed	131
Notice of, when to be given	132	Garnishee, notice to, sub. 3	203
Petition before answer filed	132	Infant, service of summons on . . .	52
Pleadings, generally	134	Injunction granted by clerk, mo- tion to dissolve	290
after demurrer, sustained	94	amendment of, secs. 271, 273, 276, 286, 289, 290, 296, 297, 747 . .	
costs upon, sub. 5	113	Judgment, appeal from after ac- cepting satisfaction of	757
during vacation, sub. 2	109	Justices' courts, district in which action is to be tried	710
petition before answer	132	Land, sale of when held in trust .	496
variance in, to cure	129, 130	Mandamus, amendment of May 15, 1886, repealed	475
Proof, to conform to	129, 130, 134	Married women, concerning	34
Return on summons	49	New trial, time to apply for, when special verdict	342
Summons, return on	49	Non-resident, State not required to give bond to	411
Transcript of record in Court of Ap- peals, sub. 1	743	service of summons, on	51
Vacation, filing of in	109	service of petition, on	56
Variance, corrected by	129, 130, 134	Notice of motion to dismiss appeal .	757
Verification of, court may dispense with	139	to garnishee, sub. 3	203
Without leave of court	132	Person of unsound mind, service of summons on	53
Amendments to Code, and acts—		Refunding bond to legatee or dis- tributee	435
Affidavit for warning order by one plaintiff, sub. 2	550	Revivor of action may be by peti- tion	501
Appeal, notice of motion to dismiss after accepting satisfaction of judgment	757	Sale of land held in trust	496
damages against corporation upon affirmance or dismissal	764	of persons under disability, sub. 5,	496
Arrest, order of may be granted by clerk	738	Separation of witnesses	601
Assignment of errors not required .	737	Special verdict, not allowed	327
Attachment, notice to garnishee, sub. 2,	203	time to apply for new trial, when verdict special	342
in certain actions clerk may issue Bill of exceptions, time to pre- pare	238		
Bond, Commonwealth not required to execute to non-resident	411		
refunding bond, legatee or dis- tributee to give	435		

Amendments to Code, and acts— *Continued.*

Summons, service of on infant . . .	52
service of on person of unsound mind	53
Trial of set-off or counter-claim in inferior court	720
of equitable actions	364
in inferior courts	710
Transcript, additional may be filed	756
Transfer of actions from one docket to other	10
Variance between pleading and proof, what is not	131
Verdict, special not allowed . . .	327
Warning order, affidavit for by one plaintiff, sub. 2	550
Court of Appeals, in	736
Witnesses, separation of	601

Acts—

Comparison of handwritings	604
Dower, sale of, lunatics' inchoate right of	495
release of, by wife of insane husband	495
Elisor, may execute process	667
Forcible entry and detainer, judge to try	454
Land, partition of	409
Settlements, recording of	472

Amount in controversy—

Appeal to Court of Appeals, what authorizes, page 547.	
to circuit court, what authorizes, page 548.	
to quarterly court, what authorizes, page 549.	
Exceeding ten dollars, appeal allowed from judgment on bond	655
Judgment not exceeding twenty-five dollars, cannot be enjoined .	284

Answer—

Allegations not traversed admitted that must be proved	126
Amendment after demurrer	94
generally	134
may be filed in vacation	109
without verification	139
Avoidance, plea of, in	95
Caption of, generally, sub. 1	110
if counter-claim or set-off pleaded, sub. 4,	97
Causes of, defense that may be stated, sub. 2	113, 95
Claimants' petition taken as	29
Contents of	95
Costs of amending, party in fault to pay, sub. 5	113, 94
Counter-claim need not be stated in may be pleaded in	17 96
to be stated in caption, sub. 4 . .	97

Answer— *Continued.*

Cross-petition, in, sub. 3	96
Defendant constructively summoned, when may file	414
defense by, when due	102
may file any time before judgment	408
petition when taken as true against	409
Defense that may be stated in, sub. 2	113, 95
Demurrer to, generally	93
filed in vacation	109
filed to part of, sub. 1	113
special	92
Denial, generally, sub. 7	113, 126
inconsistent, not allowed, sub. 4 .	113
of knowledge or information, sub. 7	113
may be in the alternative, sub. 4 .	113
must be specific	126
Equitable action, when to be filed, 102,	104
Estoppel, plea of, in	95
Failure to file, judgment . 126, 379,	380
Filing in vacation	108
after demurrer overruled	133
defect to cure in vacation	108
time given for	107
Forms of, pages 617, 628.	
Information or knowledge, denial of, sub. 7	113
Interrogatories annexed to . 140, 143,	716
Judgment for part not controverted by	380
upon failure to file	126, 379
Knowledge or information, denial of, sub. 7	113
Land to recover, in action	125
Libel, in action for	124
New parties may be made by . . .	23
Objection to petition shown by . .	118
Ordinary action, when to be filed .	102
Paragraphing, when required, sub. 3	113
Petition, defect in, shown by . . .	118
may prevent partial defense to sub. 2,	113
Prayer for relief in	97
Set-off need not be pleaded in . . .	17
may be pleaded in	96
to be stated in caption if pleaded, sub. 4	97
Slander, in action for	124
Striking out cause of action in . .	84
Supplemental, when allowed . . .	135
Time for filing, in equitable actions	102, 104
may be extended	107
ordinary actions in	102
Traverse in, definition of, sub. 7 . .	113
inconsistent, not allowed, sub. 4 .	113
may be in the alternative, sub. 4 .	113
must be specific	126
Vacation, filing of in, notice of . .	108

<i>Answer—Continued.</i>	SECTION.	<i>Appeals—Continued.</i>	SECTION.
Verification of, generally	116	Docket of, to be printed, sub. 2 . .	754
after trial begins, not necessary . .	138	what appeals shall not be placed	
alimony and divorce, not neces- sary	421	on	740
division of land, allotment of		Dower, from allotment of, sub. 12 .	499
dower not necessary, sub. 14 .	499	Enforcement of mandate	762
interrogatories annexed to . . .	148	Errors appearing in record ground	
judgments to enforce, satisfaction		for reversal	514
of	440	must be substantial . . . 338,	756
who must verify	117	not ground for appeal until acted	
Writings that must be filed with .	120	on in lower court	516
relied on as evidence	128	that must be acted on in lower	
		court before	516, 763
Answers to interrogatories—		Final orders, that may be appealed	
See INTERROGATORIES	140	from	266, 298
		Filing transcript. See TRANSCRIPT, <i>infra</i> .	
Appeals—		Form of bond and orders concern- ing. See FORMS.	
<i>Court of Appeals to.</i>		Granting of	734
Affirmance of judgment, damages	764	Judgment, filing copy of, authorizes	734
proceedings upon in court below,		for what errors reversed . . 338,	756
sub. 1,	761	what errors not reversed, until	
Amount, necessary to give jurisdic- tion, page 547.		motion made to correct . 516,	763
Appearance, who may enter and ef- fect, sub. 5	737	Jurisdiction, page 547.	
Appellant, who is	735	Land, from division of, sub. 12 . .	499
Appellee, who is	735	Limitation of, right to	745
Appeal granted as matter of right .	734	Mandamus in	475
granted by lower court, when rec- ord to be filed	738	Mandate, enforcement of	762
how taken in Court of Appeals .	734	proceedings on in court below . .	761
when granted by lower court . .	734	when to issue	760
when shall not be granted . . .	745	Misprision, not ground for, until .	516
Assignment of errors repealed . . .	737	Motion to affirm as delay case . .	759
Attachment, from final order dis- posing of	266, 267	to dismiss	757
Attorney for absent defendant, ap- pointment, sub. 3	736	to correct errors before appeal .	763
Bond, supersedeas—See SUPERSE- DEAS, <i>infra</i> .		to discharge supersedeas	750
<i>Certiorari</i> , court may direct writ to issue, sub. 1	743	Opinions, reporter's duty concern- ing	766
party may have writ of, when .	742	to be in writing	765
Circuit court, from, page 547.		Parties to	735
Costs, appellant may be required to secure	744	Pleas on, when allowed	758
Cross-appeal, how taken, sub. 1 . .	755	Printing of docket of	754
not prevented by dismissal of ap- peal or failure to take, sub. 3, .	755	Receiver, from orders concerning .	298
right to take, when barred, sub. 2, .	755	Records of. See TRANSCRIPTS, <i>infra</i> .	
Damages upon affirmance or dis- missal	764	Rehearing, rules to for be made by court	760
Delay case, disposition of	750	Reporter, duties of	766
Dismissal of, damages upon	764	Reversal of judgment of circuit court	513
does not prevent cross-appeal, sub. 3	755	not allowed for errors that may be corrected in lower court .	516, 763
for failure to file transcript . . .	740	proceedings to obtain shall be by sub. 2,	515
motion for to be in writing . . .	757	proceedings on in court below . .	761
motion for, when to be heard . .	757	Revivor of	767
Docket of, to be arranged by clerk, sub. 1,	754	Rules of Court of Appeals. (See RULES, page 593)	760
		Schedules for, appellant, when re- quired to file, sub. 4	737
		when allowed to file, subs. 4, 7,	737
		appellee, when may file, subs. 4, 7	737

SECTION.	
Appeals—Continued.	
Schedule for, constitute part of record, sub. 10	737
judge, when may prepare, sub. 2,	737
Security for costs on	744
Statement to be filed with by appellant	739
<i>Subpoena duces tecum</i> , when court will issue, sub. 2.	743
duty of clerk, when delivered to, sub. 9	737
Summons on, how served, sub. 2, 3	736
duty of appellant concerning, sub. 1	739
When not necessary, sub. 1	736
Supersedeas, definition of	752
bond, before what clerk to be executed, sub. 1	749
<i>Bond</i> , form of, page 650.	
by whom issued, sub. 2	749
motion to discharge	750
necessary to stay proceedings	747
not to issue until bond executed	748
proceedings partially stayed by	751
Tax on	746
Time of trial of.	753
Title of parties to.	735
Transcripts affidavit for warning order filed with, sub. 2	739
amendment of, sub. 1	742
certifying of, by clerk, sub. 12	737
costs of immaterial parts of, sub. 11.	737
exhibits of like character, how stated in, sub. 8	737, 335
filing of by appellant.	738
filing of by appellee	741
index of, sub. 12	737
instruments of same kind, how stated in, sub. 8	737, 335
notice of filing schedule for, by appellant, subs. 4, 7	737
orders for, by appellant, subs. 1, 4, 5, 6, 7	737
order for entire record, when necessary, sub. 3	737
order for if cross-appeal taken, sub. 4.	737
order for all or part of by appellant, subs. 2, 3, 4, 5, 6	737
order for if appeal granted in Court of Appeals, sub. 7.	737
order for by appellee, subs. 1, 4 7	737
order for part of record, sub. 2.	737
preparation of generally	737
record, when part of may be copied, subs. 2, 4	737
record, when additional may be filed	736, 742, 743
record, when entire must be copied, subs. 3, 6	737
schedule for, see above.	
time of filing.	738

SECTION.	
Appeals—Continued.	
Trial of, time of.	753
Warning order, sub. 1	739
<i>Circuit court to.</i>	
Amount in controversy necessary to, page 548.	
Appellee, right of when appellant moves to dismiss	730
Award, from judgment of justice on, sub. 9	451
Bond to be executed	724
Costs upon	727, 728
County court, from, page 548.	
Distress warrant, from judgment on bond	655
Generally, page 458.	
Fiscal court from, page 548.	
Forcible entry and detainer in	463
How taken	724
Inferior courts, from, how taken	724
Original papers to be transmitted	725
Privilege of appellee upon trial of	730
Quarterly court, from, page 548.	
Time in which to be taken	729
Trial of	726
When to be taken	729
<i>Quarterly courts to.</i>	
Amount in controversy necessary to, page 549.	
Bond to be executed	724
Costs upon	727, 728
Distress warrant, from judgment on bond discharging levy of	655
Generally, page 549.	
How taken	724
Original papers to be transmitted	725
Privilege of appellee upon trial of	730
Time in which to be taken	729
Trial of	726
When to be taken	729
Appearance—	
Attorney for absent defendant may enter, when, sub. 4	59
when acts of do not, sub. 5	59
Bond, executing in attachment is	690
Defendant constructively summoned allowed five years	414
time may be reduced to one year	415
Entering of, in Court of Appeals, sub. 5,	737
Appendix—	
Change of venue, page 571.	
Courts having four judges, page 568.	
Courts having continuous sessions, page 557	
Jurisdiction of courts, page 547.	
Removal of actions to United States Courts, page 580.	
Rules of Court of Appeals, page 593.	
Special judges, page 569.	

	SECTION.		SECTION.
Application—		Arrest and bail—Continued.	
Of Code to actions generally	16	Affidavit for order of arrest before	
to actions now pending	887	debt has matured, sub. 1 . . .	238
to actions to be commenced here-		<i>Form of, page 629.</i>	
after	838	of bail as to qualifications	164
to proceedings in inferior courts	700	of insolvency, by defendant, 158,	168
For order is motion	623	may be used on motion to dis-	
		charge order of	178
Apportionment of costs—		Bail, separate action against . . .	172
Action for division of land, allot-		affidavit of, as to qualifications .	164
ment of dower, sub. 18	499	arrest of, defendant by	170
On appeal from inferior courts . .	727	bond of, may be taken by sheriff,	163
		deposit of money in lieu of . . .	159
Appraisal of property—		discharge of, by surrender of de-	
Attached	215	fendant	169
Before taking forthcoming bond in		discharge of, by vacating order of	
injunction, sub. 1	278	arrest	177
<i>Forms of, pages 633, 635.</i>		exoneration of, by death of de-	
In action for claim and delivery . .	189	fendant	173
Levied on under execution or dis-		liability of, how fixed	171
stress warrant	646, 653	liability of, generally	167, 176
May be objected to	649	liability of officer as	174
Of personal property owned jointly		liability of, how fixed and en-	
levied on, sub. 1	660	forced	175
Return of, to circuit court	647	objection to, for insufficiency . .	165
		qualifications of	164
Arbitration and awards—		reduction of amount of	177
Appeal from award, sub. 9	451	<i>scire facias</i> against, abolished . .	179
Arbitrators' notice of time of meet-		time and manner of giving . . .	163
ing, sub. 6	451	Bond before order for issues . .	154, 240
oath to be taken by, sub. 2 . . .	451	<i>Form of, page 629.</i>	
Attachment allowed in action on .	194	of defendant to obtain discharge,	163
Award shall be entered as judg-		to be canceled if order vacated .	177
ment, sub. 7	451	Breaking buildings to execute . .	676
Controversies which may be sub-		Capias may issue against defendant,	168
mitted, sub. 1	451	Debt not due	237, 238
within jurisdiction of, justice		order and requisites	238, 239
may be, sub. 9	451	sections applicable	241
Fiduciaries may submit matters to,		Deposit of money in lieu of bail . .	159
sub. 4,	451	officer to be officially liable for .	162
Meeting of arbitrators, sub. 6 . . .	451	orders for safe-keeping of . . .	161
Not to be set aside for informality,		received by officer to be paid into	
sub. 8,	451	court	160
Oath of arbitrators and umpire,		Discharge of defendant by execut-	
sub. 2,	451	ing bond	163
Order for, may be set aside, sub. 5 .	451	by deposit of money	159
Powers of arbitrators, sub. 3 . . .	451	by taking oath of insolvency . .	168
court over award, sub. 8	451	Election, exemption from arrest at,	666
Submission to, how made, sub. 1 . .	451	Escape or rescue of defendant li-	
Subpoena may be issued by arbitrat-		ability of officer for	174
or, sub. 3	451	how liability of officer fixed and	
Umpire may be selected to act with,		enforced	175
sub. 1	451	Execution against the body of de-	
Witnesses, attendance of, coerced,		fendant	168
sub. 8,	451	Exemption from arrest at election	
		or court	666
Argument—		Exoneration of bail	173
Order of, upon trial, sub. 6	817	of officer for taking insufficient	
in Court of Appeals, sub. 1	760	bail	166
		<i>Forms concerning arrest and bail,</i>	
Arrest and bail—		<i>pages 629, 630.</i>	
Affidavit for order of arrest after		Insolvency, oath of, defendant may	
debt matured	153	take	158, 168

	SECTION.		SECTION.
Arrest and bail—Continued.		Assessment of damages—	
Liability of bail or officer, how fixed	171, 175	Court may assess, or order jury or commissioner to	379
Money, deposit of in lieu of bail . .	159	Injury to person or character court, may assess, sub. 2	331
officer to pay into court, liability of for	160, 162	Jury to assess in actions for personal property	330
Notice of intention to take oath of insolvency	168		
Objection to bail for insufficiency .	165	Assignee—	
Officer. See SHERIFF, <i>infra</i> .		Actions by and against	19, 21
Order of arrest, affidavit for	153, 238	Bankrupt of, may bring action in his own name	21
bond for	154, 240	Chose in action of, action by without prejudice	19
clerk may make, in action for money due	153	may be substituted as plaintiff .	20
who to make	238	Costs, insolvent may be required to secure	619
execution of	157	Ky. Stat., applicable to	471
Form of, page 630		Settlements of may be recorded . .	472
two justices may make when money not due	689		
requisites of	155	Assignment—	
return day of	156	Does not render assignor competent to testify, sub. 9	606
vacation of, how and before whom motion for made	177	Pending action, provisions as to costs	20
Qualifications of bail	164	To prefer creditors, provisions applying to	438
objection for want of, how and when made	165	Verification of pleadings in action on, sub. 3	116
Rearrest of defendant	167		
Rescue of defendant, officer liable for	174	Assignor—	
Return of "not found" necessary to fix liability of bail	171	When necessary party to action . .	19
Scire facias against bail abolished .	179		
Sheriff to execute order by arresting defendant	157	Association—	
buildings, may break to execute order	676	Non-resident, summons against . .	51
exoneration of, if bail insufficient, liability of, for money taken in lieu of bail	166		
liability of, for escape or rescue of defendant	162	Asylum—	
liability of, how fixed and enforced	171, 175	Inmate of, service of process on . .	53
may take money in lieu of bail .	159	Venue of action against	69
money taken in lieu of bail, how disposed of	160		
right of to sue bail	176	Attachments general—	
to commit defendant to jail	158	In actions for money due	194
to indorse time of receiving order of arrest	674	Affidavit for	196
Surety may obtain order of arrest against principal	662	may be amended, sub. 2	268
Survey, exemption from while attending	666	Bond for	198
Vacating order of arrest, motion for, evidence that may be heard on .	177	defective may be amended	682
Witnesses exempt from while attending court	666	Grounds for generally	194
		against defendant who has been from State four months	194
		defendant who has departed from State to defraud creditors . .	194
		defendant who is foreign corporation or non-resident	194
		defendant who has left county of residence to avoid process . .	194
		defendant who conceals himself .	194
		defendant removing his property out of State	194
		defendant who is endeavoring to defraud creditors	194
Article—			
Defined, sub. 1	733		
(44)			

	SECTION.		SECTION.
Attachments general—Continued.		Attachments general—Continued.	
Grounds for against defendant who has not sufficient property to pay debt	194	Bond to discharge to be executed before clerk or sheriff	222
in action to recover personal property	194	to discharge is appearance to action	690
in action on contract judgment or award	194	to joint owner of property levied on	208
may be shown by officer's return on summons	197	Delivery of property upon execution of bond	214
rent, to recover	195	Delivery of property upon execution of bond, discharging	221
when not allowed against foreign corporation or non-resident	194	Discharge of attachment, bond for motion for before attachment sustained	221
In actions for money not due—		motion to in vacation	265
Affidavit for	238	order for, when final	266
may be amended	268	order for, after attachment reinstated, final	267
Bond for	240	Disposition of attached property before judgment	218
defective may be amended	682	application for, how and before whom made	218
Granting of generally	238	property may be sold	218
by two justices	689	Enforcement of bond	232
Grounds for	237, 238	Evidence on trial of attachment	264
Order of must specify sum for which it is granted	239	Execution of attachment on fund in court	207
Specific attachments—		on garnishees	208
Allowed in certain cases	249, 250	interest in joint property	208
Bond for	252, 253	personal property generally	203
Officer's duty as to property levied on	255, 256	personal property in officer's possession	203
Powers of court over defendant in	257	real property	203
Provisions concerning general attachments apply to	258	personal property to be first taken	206
Requisites of order for	254	Exempt property	200
Who may grant	251, 689	Forms in generally, pages 633, 636.	
In actions for specific personal property	194	Garnishees, against action	227
In actions to enforce satisfaction of judgments	441	action against when to be dismissed	228
For rent	195	appearance by	224
General provisions concerning attachments—		attachment against	227
Affidavit required before sale of real property	230	bond of to retain money attached	225
defective may be amended	268	disclosures by	224
grounds of attachment, controverted by	263	examination of, concerning property	225
Form of, page 633.		execution of order of attachment on, sub. 3	203
of parties to have no effect except as pleadings	263	liability of	225
Amendment of grounds of attachment	268	may be compelled to answer	226
Appraisalment of property before taking forthcoming bond	215	payment of money by	223
Bond for forthcoming of property	214	punishment of	205, 226
appraisalment of property before taking	215	to furnish sheriff with description of property	205
defective may be amended	682	Grounds of attachment	194, 238
enforcement of	232	Indemnifying bond may be required by officer	211
execution of is appearance	690	Information may be required of defendant	220
indemnity may be required before levying	211	Joint property, attachment of interest in	208
to be executed before attachment issues	198, 240	bond to joint owner	208
to discharge attachment given	221	sale of, when authorized	209

	SECTION.
Attachments general—Continued.	
Judgment, in action to enforce	441
for plaintiff, attachment to be sustained	261
for defendant, attachment to be discharged	260
justices' courts in	721
Keeping of property by officer, expenses to be paid	219
Lien of attachment	212
Money due, of	194
not due, of	238
Officer, duty of when order executed upon	204
Pendency of on same property in different courts, transfer	210
Perishable property, sale of	218
Pleadings in attachments, affidavits of parties constitute.	263
Power of court as to sales of property	233
Priority of attachments	202, 207
reference to commissioner to ascertain	235
Property exempt from levy	200
how attachment levied on real and personal	208
how upon fund in court	207
joint, how attached and subjected	208, 209
personal to be first taken	206
pursuit of by officer	213
real, of non-resident not to be sold until affidavit filed	230
surplus proceeds of, disposition of	231
Pursuit of property by officer	213
Receiver to dispose of property	218
Reference of attachments to commissioner	235
Reinstatement of attachments	269, 270
Rent, for	195
Retaking of property by sheriff	234
Sale of attached property	696
of property generally	694, 696
of property of absent defendants	230, 410
of property of joint owners	209
of perishable property	218
Security on bond, motion for additional	236
Sheriffs, execution of attachments by	203, 206
on fund in court, and property of jointowner	207, 208
breaking buildings, when allowed	675
indorsement of time of reception, keeping of property by	674, 219
officially liable for money received	218
pursuit of property by	213
requirement of indemnifying bond, requirement of bond before levying on joint property	211, 208
retaking of property by	234

	SECTION.
Attachments general—Continued.	
Sheriffs, return of attachment by	217
served with attachment, duty of	204
taking of forthcoming bond by	214
taking of bond to discharge attachment by	222
Sureties, attachment by before debt matures	238
after maturity of debt	662
may be required to make affidavit as to qualifications	683
qualifications of	684
Surplus proceeds, to be returned to defendant	231
Sustaining of attachment, proceeding upon	229, 262
when to be sustained	259, 261
Transfer of from one court to another	210
Trial of	259, 264
upon motion to discharge	265, 268
Attesting witnesses—	
Affidavit of, as to service of summons	50
Competency of as witness not affected, sub. 11	606
Attorney—	
Affidavit of, for client generally	550
must show that he is attorney for party, sub. 5	550
that party is absent from county, sub. 5,	550
to obtain warning order	58
to verify pleadings of Commonwealth, sub. 1	117
to verify pleadings of corporation, sub. 2,	117
to verify pleadings generally, sub. 3,	117
Attendance of as witness when required	556
can not be compelled	555
deposition of to be taken	554
Client may have judgment against on motion	444, 449
communication to privileged, sub. 5,	606
Costs, liability for	113, 621
Deposition of, to be used on trial	554
Docket, names to be placed on	353
For defendant constructively summoned, sub. 1	59
compensation of, sub. 6	59
duties and powers of, subs. 2, 6	59
name of not to be suggested by plaintiff, sub. 1	59
qualifications of, sub. 1	59
Guardian <i>ad litem</i> must be, sub. 2	38
Judgment may be had against on motion	444, 449

	SECTION.		SECTION.
Attorney—Continued.		Avoidance—Continued.	
Liability of for costs of client . . .	621	Rejoinder may contain plea of . . .	99
for costs of sham pleadings, sub. 8	113	Reply may contain plea of . . .	98
May be required to enter satisfaction of judgments . . .	393	Award—	
Motion against for money collected .	444	See ARBITRATION AND AWARD.	
Notice of motion or proceeding may be served on . . .	625, 631	Attachment allowed in action on . .	194
to person constructively summoned . . .	630	Baggage—	
to take depositions may be served on, when . . .	632	Testimony of husband and wife concerning, sub. 1 . . .	606
to corporation may be served on .	628	Bail—	
Of party, not to be appointed receiver . . .	300	See ARREST AND BAIL.	
plaintiff, not to suggest guardian <i>ad litem</i> , sub. 2 . . .	38	Bailiff—	
plaintiff, not to suggest corresponding attorney, sub. 1 . .	59	May be appointed to execute process generally . . .	668
Satisfaction of judgment, when to be entered by . . .	393	to execute in inferior courts . . .	701
Testimony of as to professional communications, sub. 5 . . .	606	Bank—	
Warning order, defendant for . . .	59	Check, action on . . .	19, 26
Witness, not required to attend as . . .	554, 555	Deposits in, by courts generally . .	307
when attendance of, as required .	556	Evidence of officers of to be taken by deposition . . .	554, 555
		attendance of as witnesses, when required . . .	556
Attorney-general—		Security for costs not required of, when . . .	616
Action to be brought by to repeal or vacate charters . . .	481	Venue of actions against . . .	71
for usurpation of office . . .	485	Bankrupt—	
Kentucky Statutes applicable to adopted . . .	450	Action by assignee of . . .	21
May appeal in mandamus without security . . .	478	Discharge of, effect as to summons effect on surety . . .	80 693
Pleadings of Commonwealth to be verified by . . .	116, 117	Bill and notes—	
Attorney for Commonwealth—		Actions on generally . . .	19, 26
Actions by for usurpation of county offices . . .	484	Bill of discovery—	
charters to repeal . . .	481	Action to enforce judgment . . .	439
Verification of pleadings by, sub. 1 .	117	To learn name of joint debtor . . .	685
Auditor of public accounts—		Bill of exceptions—	
Evidence of, must be taken by deposition . . .	554, 555	See EXCEPTIONS.	
Personal attendance as witness when required . . .	556	Absence of judge who presided, practice . . .	337
Authority—		Bystanders bill . . .	336
Conferred on three or more, majority may act . . .	679	Controverting by affidavits . . .	337
Averments—		Exhibits, how shown in . . .	335
See ALLEGATIONS.		Evidence to be stated in full, when Form of not particular, sub. 1 . . .	335
Avoidance—		How prepared . . .	335
Answer may contain plea of . . .	95	May be supported by affidavits . .	337
Express admission not necessary in plea of, sub. 6 . . .	113	Preparation and certifying of, 335, 337, 339	339
		Signing by judge . . .	339
		Time to prepare . . .	334, 336

	SECTION.
Bill of exchange—	
Action on, if lost	7
on generally	19, 26
Must be filed with pleading, if it can be produced	120
Board of education—	
Venue of action against	68
Bona fide purchaser—	
Title of not affected by new trial to infant	391
nor by new trial to defendant constructively summoned	417
Bonds—	
Action on may be joint or several	26, 27
on lost, may be at law or equity	7
Appearance entered by, when	690
Arrest and bail. <i>Forms of</i> , pages 629, 630	
Attachment. <i>Forms of</i> , pages 633-636	
Claim and delivery. <i>Forms of</i> , in, pages 631, 632.	
Clerk to prepare.	672
Costs for, who required to give	616, 619
attorney liable for, when	621
bond for, page 626.	
judgment on bond for	444, 449
Defective may be amended	682
Defense, to forthcoming bond	216
Execution on holiday	664
Filing of, with pleadings	120
<i>Forms of generally. See FORMS.</i>	
Holiday, may be taken on.	664
Injunction. <i>Forms of</i> , pages 636, 637.	
Judgments, that have force of	697
Sureties, qualifications of	683, 684
Mentioned in Code—	
appeal	724, 748
arrest, to obtain order of	154, 240
attachment general, to obtain	108
in certain cases, to obtain	240
specific, to obtain	252
to discharge	221, 258
to officer before levying	211
bail of	163
claim and delivery	184, 185, 188
claimant of	645, 652
costs for	616
delivery of property, in action for	184, 185, 188
distress warrant to discharge	653
distributee, to refund	485
execution to discharge levy of	278
foreign personal representative	404
forthcoming of property by party enjoining execution	278, 279
of property by joint owner	660
of property attached	214, 258
garnishee for money attached	225

	SECTION.
Bonds—Continued.	
Mentioned in Code—	
indemnity to obligor in lost writing	7
to owner of interest in joint property	208
to sheriff before levying attachment	211
to sheriff before levying execution	641
to sheriff before levy of distress warrant	652
to sheriff before taking property under order of delivery	191
infants before sale of real property of	493
injunction, to obtain order of	278
to answer for disobedience of	286
judgment, to perform before transfer to equity	14
before against absent defendant,	410
legatees, to refund	435
money lent by court, to secure	308
non-resident, to restore property to	410
before judgment against	410
possession of attached property, to retain	214
purchase money for, of attached property	218
of property sold under order of court	697
receivers generally	301
attached property	218
refunding bond	435
restoration of property to defendant constructively summoned	410
sale under execution, to suspend	645
distress warrant to suspend	652, 653
subpoena to answer for disobedience of	537
supersedeas	724, 748
tenant to discharge levy of distress warrant	653
to suspend levy in part	658
to replevy distress warrant, page 642.	
transfer of action from ordinary to equity	14
traverse, in forcible entry and detainer	463
witness failing to obey subpoena	537
writing lost, before suit on	7
Must be filed when foundation of action	120
Lost, bond of indemnity before action on	7
Proceedings on of tenant	654, 657
Supersedeas, on appeal to Court of Appeals	748
on appeal to circuit or quarterly court	724
Sureties in may be sworn	683
qualifications of	684

	SECTION.		SECTION.
Book—		Causes of action—	
Accounts in, concerning evidence as to, sub. 7	606	Allegation necessary to support . .	127
Clerk to keep, of judgment with index	392	Dismissal of, without prejudice by plaintiff, sub. 1	371
Justices, of proceedings in courts of to be kept	715	without prejudice by the court, sub. 2,	371
Breaking—		Joinder of. See JOINDER OF ACTIONS	83
Building or inclosure, by officer with attachment	675	Paragraphing of, sub. 3	113
by officer with order of arrest . .	676	Striking out of, by party	84
Bridge—		by court	85
Venue of action against contractor for work on	77	Causes of controversy—	
Burden of proof—		Statements of, by parties, are pleadings	87
On whom it lies	526	Caveats—	
Party having to produce his evidence first, sub. 3	317	Provisions concerning	473
having to conclude the argument, sub. 6,	317	Certainty—	
Bystanders—		Required in pleading	124
May be compelled to testify	602	Certificate—	
When to certify bill of exceptions, sub. 3, 4, 5	337	Clerk to transcript, sub. 12	737
Capacity to sue—		Justice to transcript	724
Objection for want of, made by answer, when	118	Officer to affidavit	551
waived unless made by demurrer or answer	118	to deposition	582
Want of, ground for special demurrer	92	to deposition may be amended, sub. 2,	588
Capias ad satisfaciendum—		Personal representative's authority to obtain execution	404
Form of, page 639.		Physician, to dispense with service of summons on lunatic	53
May issue on judgment against defendant held to bail	168	Certiorari—	
Caption—		Issuing of by clerk of Court of Appeals	742
Interrogatories to state name and residence of witness, sub. 1	575	Order of, by Court of Appeals, sub. 1	743
Pleadings	110	Challenge—	
Pleadings when counter-claim or set-off pleaded, sub. 4	97	Jury, provision as to	316
Carrier, common—		Chancery—	
Husband and wife may testify against concerning baggage, sub. 1,	606	See EQUITABLE ACTIONS .	
Summons against, on whom to be served, subs. 3, 4, 5	51	Chancery docket—	
Venue of action against	73	See EQUITY DOCKET .	
Case—		Change of venue—	
Agreed	687	Circuit courts—civil cases	
Civil, defined	1	Adjacent county, change to	572
Delay case, disposition of	759	Application by verified petition . .	572
		affidavits in support	572
		affidavits, counter	572
		cause for continuance, when	573
		notice of	573
		one only from same party	573

	PAGE.		PAGE.
Change of venue—Continued.		Change of venue—Continued.	
<i>Circuit courts—Civil cases—</i>		<i>In criminal cases—</i>	
Case triable by the court, when transferred	573	Remanded—when case to be	579
Chancery case, when transferred	573	costs of transfer, how paid	578
Clerk's duty under the order	572	motion for—who to make	578
Consent, parties may	571	original papers and transcript transferred	579
Continuance, application cause for	573	removal of defendant	578
Notice of application	572	witnesses recognized	579
Odium attending party or cause	571	Removal from lawless county	576
One application only from same party	573	expense paid by county	576
Order void if expense of removal not paid in ten days	572	when costs paid by county	578
Power of court to which cause removed	573	Removal of defendant in custody, 577, 578 when on bail	577, 578
Terms and conditions of change	572	Transfer made by clerk	577, 579
Transfer of case triable by court	573	mileage	577, 579
chancery case	573		
Trial of application, discretion of court	572	Chapter—	SECTION.
evidence that may be heard	572	Defined, sub. 1	732
when removed case stands for	573		
When removed case stands for trial	573	Character—	
<i>Inferior courts—civil cases.</i>		Action for injury to, joinder of, sub. 5	88
Clerks' duty when change ordered	574	for slander or libel	123
County to circuit court	573	Of witness, how attacked	596, 597
Justices' courts—when demandable	574	how supported	599
justice absent another may act	574	Venue of action for injury to	74
justice disqualified another may act	574		
Original papers transmitted	574	Charge of court—	
Quarterly to circuit court	573	See INSTRUCTIONS.	
Remanding case—when	574		
duty of clerk in regard to	574	Charters—	
<i>In criminal cases.</i>		(See REPEALING OR VACATING CHARTERS)	480
Adjacent or most convenient county, 575, 576			
Affidavits—requisites of	576	Checks—	
Application by Com'wealth—grounds	575	Action upon lost	7
cost of removal paid by county	578	against persons severally liable upon	26
one application or change only	578	by assignee of	19
petition and notice	576	Money deposited by court to be paid upon check of clerk	307
Application by defendant, grounds	575		
one application or change only	578	Chief officer—	
petition—affidavits—notice	576	Corporation, who is, sub. 33	732
City judge—change to justice	579		
Clerk's duty in making transfer 577, 579		Children—	
Convenient county—change to	575	See INFANTS.	
Costs of transfer—how paid, 577, 578, 579			
County judge—change to justice	579	Chose in action—	
Justice—change to another justice	579	Action by assignee of	19
Mileage of person making transfer	577	for subjection of, to satisfaction of judgment	439
Papers transmitted—originals	577		
copies when to be retained	577	Circumstances—	
originals retained, when	577	Mitigating, and truth pleaded in action for libel or slander	124
Police judge—change to justice	579		
Preparation for trial	577		
Proceedings when defendant in custody	577, 578		
when defendant on bail	577, 578		
Recognizances of witnesses	577, 579		

	SECTION.		SECTION.
Circuit court—		Claim and delivery of property—Continued.	
See COURTS.		Sheriff to indorse time of reception	
Circuit judge—		of order	674
See JUDGES.		Verdict, form of	330
What judges the words embrace,		judgment on	388
sub. 14, 732			
City—		Claimant of property—	
Summons in action against	51	Attached, to give information con-	
		cerning	220
City courts—		may file petition and assert claim	29
See POLICE COURTS.		may execute bond and retain	
Civil actions—		property	214
Code applies to all	16	Bond of, to suspend sale under exe-	
Defined	2	cution	645
Civil case—		to suspend sale under distress war-	
Defined	1	rant	652
Special proceeding is	1, 3	motion on bond of, to suspend	
Civil proceedings in behalf of State—		execution sale	648
Provisions of Ky. Stat. adopted . .	450	of indemnity, if property taken	
Claim and delivery of property—		under order of delivery . . .	191
Affidavit for	181	return of, to suspend execution	
Form of, page 630.		sale	647, 651
value of each article to be stated		return of, to suspend sale under	
in	182	distress warrant	652
Appraisalment of property before		In litigation, may file petition . .	29
taking bond	189	may be interpleaded by defend-	
Bond for	184, 185	ant	30, 31
Forms of, pages 631, 632.		Petition to be made party . . .	29, 30
indemnity to sheriff before deliv-		Substitution for defendant . . .	30, 31
ering property	191		
of defendant to retain possession .	188	Clearness—	
Concealment of property by defend-		Required in pleading	115
ant	193	Clergyman—	
Defendant, punishment of for re-		Not to testify as to confessions, sub. 5,	606
moving property	193	Clerical misprision—	
Immediate possession, plaintiff may		Correction of to be by motion . . .	519
claim	180	in rendering premature judgment,	519
Judgment in action	388	Defined	517
Jury to assess value and damages .	330	Ground for new trial	518
Order of delivery, contents of . . .	183	Motion to correct before appeal, 516,	763
clerk to issue	181	Not ground for appeal until . .	516, 763
Form of, page 631.		Clerk—	
may issue to different counties . .	192	Embraces what persons . . sub. 39,	732
removing property, punishment .	193	Reference of word sub. 12,	732
restoration of property to defend-		Clerks of courts—	
ant	188	Absent defendants, warning order	
Sheriff to execute	186	made by	57
disposition of property taken		warning order not made until	
by	187, 188	affidavit filed	58
keeping property and expenses .	190	attorney for to be appointed by .	59
may require bond of indemnity .	191	Affidavits may be taken by . .	549, 671
may break building to execute .	675	Appeals granted by clerk of Court	
not bound to keep property, un-		of Appeals	734
less bond given	191	Arrest, order of issued by in action	
		for money due	153
		order not to issue until bond exe-	
		cuted	154

	SECTION.
Clerks of courts—Continued.	
Attachment, general, issued by	196
bond for to be taken by	198
specific and special issued by an order of judge	240, 251
bond to be executed before issual	240, 253
shall describe property or specify sum	239, 254
Bonds, time of return to be indorsed on	669
to be prepared by	672
for costs to be approved by	616, 618
for performance of judgment in attachment taken by	222, 258
for supersedeas of judgment taken by	724, 748
from foreign personal representative taken by	404
<i>Certiorari</i> , to be issued by	742
Decedents' estates referred to commissioner by	431
Deeds and reports recorded by, sub. 8	499
Delivery of personal property, order for made by	181, 192
Depositions, cross interrogatories to, filed by	575
commission for, to be issued by	577
reception of by	583
return of by to officer taking, sub. 1	588
taking of by	562
Deputy may act for	678
Dockets to be kept by in circuit court	347
in Court of Appeals	753, 754
Evidence of taken by deposition	554, 555
personal presence, as witness when required	556
Execution on judgments issued by	168
Filing papers, time of, indorsed on by	669
Forcible entry and detainer, traverses docketed by	465
Holiday, issual of process on by, 664, Guardian <i>ad litem</i> , appointed by	38
Index of judgments, shall be kept by	392
of transcripts, shall be made by, sub. 12	737
Injunction, order of granted by, when	273
bond to be taken by before issuing	279, 280
insufficient, liability of for taking	280
Judge of quarterly court to act as county clerk may be empowered to act as	703
Justices, to act as clerk	702
to keep docket	704
Judgments, cross-indexed by	392
entered according to verdict, when	384

	SECTION.
Clerks of courts—Continued.	
Judgments, entered according to direction of court, when	385
issual of execution after death of plaintiff	402, 404
issual of execution against surviving defendant	405
satisfaction of, to be entered by, issual of execution on, generally,	393, 401
Liability not affected by swearing sureties in bonds	683
Misprision by. See CLERICAL MISPRISION.	
Money deposited by court paid on check of	307
Oaths, power of to administer	671
Papers to be indorsed "filed" by	669
Pleadings, day of filing indorsed by	669, 811
Subpoena issued by, at request	529
Summons, issued and signed by	40
at any time, to any county	41
delivery of to sheriff by	45, 46
may be issued on holiday or Sunday	664, 665
not to issue before petition filed, with copy for each defendant	663, 42
with copy of petition, if required, to issue when petition is filed	56, 39
to be directed to sheriff, unless ordered	667
return to be entered on docket by amendment of	670, 49
Sunday, issual of process on by	665
Supersedeas to be issued by, sub. 2,	749
Sureties, insufficient to be refused by, for costs, judgment against on motion of	673, 444
Survey, order of made during vacation	671
Transcripts to be prepared by	737
Trust estates referred to commissioner by	438
Code—	
Amendments to conform to	134
Application to actions generally	16
to actions now pending	837
to actions commenced hereafter	838
Does not affect equity jurisdiction as to partition or dower, sub. 16,	499
not change mode of forming jury	316
General provisions of	663, 669
Rules of construction of	732
Commencement—	
Of action, what is	39
jury trial, what is	590
Commission—	
To take depositions on interrogatories	576, 577

	SECTION.		SECTION.
Commissioners—		Common interest—	
Affidavit may be made before . . .	549	Actions involving, provisions as to	25
Conveyance of real property by . .	394	Common law action—	
must be approved by the court .	398	See ORDINARY ACTION.	
must be recorded	400	Common orders—	
must refer to judgment and pro-		Action on	19, 26
ceedings	395	Commonwealth—	
to recite names of parties whose		Bond not required of in action	
title passes	399	against non-resident	411
title passed by	396, 397	Civil proceedings in behalf of . .	450
Division of land and allotment of		May appeal without security in	
dower by, sub. 4	499	mandamus	478
Reference to of actions to settle es-		Verifications of pleadings of, sub. 6	116
tates	430	by whom to be made, sub. 1 . . .	117
by clerk in vacation	431	Commonwealth's attorney—	
to settle trust estates	438	To sue for usurpation of county	
to assess damages, take proof .	379	offices	484
to, of attachments to ascertain		for repeal of charters	481
priority	235	Verification of pleadings by, sub. 1	117
Commissioners of sinking fund—		Communications—	
Venue of action against	68	What are privileged, subs. 1, 5 . .	606
Committee of persons of unsound mind—		Community of Shakers—	
Action in his own name	21	Service of summons on	55
generally	35	Compensation—	
for division of land, allotment of		See FEES.	
dower, sub. 2	499	Company—	
for sale of land	480, 491	See CORPORATIONS.	
wife and children of person to be		Competency of witnesses—	
parties, sub. 3	492	See WITNESSES.	
bond executed in action for sale		Compromise—	
of realty, sub. 1	493	See OFFER TO COMPROMISE . 634, 636	
if not executed sale void, sub. 3	498	Computation—	
general provisions concerning		Of days between acts	681
sales of land	494, 498	Concealment—	
Affidavit of, for warning order . .	58	By defendant, authorizes warning	
Arbitration may be agreed to by,		order against him, sub. 6 . . .	57
sub. 4	451	authorizes attachment of his	
Bond executed by, in action for sale		property	194
of realty, sub. 1	403	Of property sued for, authorizes at-	
Costs, liability of, for, sub. 2 . . .	37	tachment, sub. 3	194
security for when required . . .	619	against which attachment is	
Defense by, formal not necessary .	126	ordered, is contempt	257
must be made, or report filed .	36	in action for possession of is con-	
failure to make, or file report,		tempt	193
contempt, sub. 3	36	minor witness, is contempt . . .	535
May consent to take depositions on		how punished	538
interrogatories	572		
Notice to person under disability			
may be served on	627		
may be served on attorney for,			
when	632		
Pleadings by, need not be verified .	116		
Settlement of accounts of, in county			
court	472		
Common carrier—			
See CARRIER.			
Common docket—			
See ORDINARY DOCKET.			

	SECTION.
Conciseness—	
Required in pleading	115
Concluding provisions of code	887, 888
Conclusions of fact—	
Instead of evidence in full, to be stated in bill of exceptions	335
Stated by judge, separate from conclusions of law	382
Conclusions of law—	
Not to be pleaded	119
Stated by judge separately	332
Confession—	
Judgment by	381
cause of action to be stated in	382
proceedings on	383
Offer of, and effect of	640
Priests not to testify about, sub. 5,	606
Confession and avoidance—	
Express admission of facts not necessary in plea, sub. 6	113
Confirmation of sale—	
See SALES BY ORDER OF COURT.	
Consent—	
Of trustee, to obtain sale of property, sub. 8	494
Consistent—	
Pleadings to be, sub. 4	113
remedy if not, sub. 4	113
Constable—	
Meaning of word, sub. 16	732
Process to, in forcible entry and detainer	454, 461
from inferior courts	701
from other courts	667
Punishment for erroneous return on summons	49
for failing to serve notice	633
Construction—	
Of terms used in Code	732
Rule of common law, not applicable to	733
Constructive service—	
Allegation of pleading not admitted in	126
when taken as true	400
Bond not given court to control property	411
before judgment in cases of	410

	SECTION.
Constructive service—Continued.	
Counter claim disclosed allowed	413
Defense when to be filed	102
Evidence in cases of, sub. 8	606
Examination of plaintiff as to claim	412
Judgment, copy of may be served	415
effect of	415
lien created by on property	418
manner of serving	416
Lien on property of defendant	418
New trial, time allowed for	414
title of property, how affected by	417
Notice, how executed on defendant,	630
Personal judgment forbidden	419
Petition against, when taken as true,	409
Service of copy of petition and effect,	56
Set-off, disclosed allowed	413
Time allowed to appear and defend,	408
Venue of action	75
Warning order	57-59
Contempts of court—	
Concealment of property, in action for specific delivery	193
of property attached	257
of minor witness	535
Disobedience of injunction	286
mandate of Court of Appeals	702
order to deposit money or property	304
order to pay maintenance <i>pendente lite</i>	424
order restraining waste	467
order to answer in action to enforce judgment	440
order to surrender money or property, in action to enforce judgment	443
of subpoena	535-539
Failure to answer interrogatories annexed to pleading	151
of attorney for absent defendant to make defense or report, sub. 5	59
of guardian to make defense or report, sub. 3	36
of defendant or claimant to disclose property	220
of garnishees to give information to officer	205
to give information to court	226
of obligor to deliver attached property	232
of officer to serve notice	633
Making erroneous return of summons by officer	49
Witness punished for	535, 538
Contingent remainder—	
May be sold on petition of owner of particular estate	491

	SECTION.		SECTION.
Continuance—		Controversy—Continued.	
Amendment of pleadings, when ground for	136	Claimant of property, may be inter-pleaded by defendant	30, 31
As to one, and judgment against another	370	Deposit in court of property in	30, 303
Of action, on account of absent witness	315	Submission of	637
affidavit for, requisites of	315	Conveyance—	
for failure to answer interrogatories	142, 145	County to be recorded in	400
Offer to compromise not ground for, on contract, as to some and judgment as to others	636	Deed to be examined by court	398
Tort, no trial as to any, unless action discontinued on first day	363	character of title, passed by, 396, names of parties in	397, 399
Witness, affidavit for personal presence of	556	Fraudulent, authorizes attachment,	194, 237
		By commissioner. (SEE COMMISSIONER)	394-399
Contract—		Convicts—	
Action against persons jointly liable on	27	Not competent to testify, if in penitentiary, sub. 8	606
against persons severally liable on, on for indemnity, before debt matures	26	Party shall not testify for himself against, sub. 8	606
As exhibit, may be filed with pleadings	237	Co-obligors—	
Attachment against non-resident may be had on, sub. 8	128	Action by, before maturity of debt	237
Genuineness of, when taken as admitted	194	after maturity of debt	661, 662
Joinder of causes of action on	527	Attachment in action	237, 238
each cause to be in separate paragraph, sub. 3	83	Form of judgment	245
Judgment against parties on	113	Order of arrest in action by	237, 238
Lost, action on	27	Coparceners—	
Must be filed with pleadings, or accounted for	7	Embraced by words "joint tenants" sub. 28,	732
Successive actions on	120	Copy of writing—	
Variance between pleading and proof	686	When to be filed with pleadings	120
Vender, to vacate fraudulent contract may have attachment	131	Coroner—	
Verifications of pleadings in action on	116	Meaning of, sub. 16	732
		Process to, from inferior courts	701
Contractor for public works—		from other courts	667
Venue of action against	77	To whom the word refers, sub. 16	732
Contradiction—		Corporation—	
Of witness by party producing him, by adverse party	596	See FOREIGN CORPORATIONS.	
how done	597, 598	Chief officer or agent of, who is sub. 33,	732
Contribution—		Cost, security for, to be given by, Foreign, attachment of property of, sub. 8,	616
SEE SURETIES.		Is person, sub. 5	194
Action by surety against co-surety for	661	Notice to, how served	732
Controversy—		Residence of, what is, sub. 32	732
Claimant of property may intervene by petition	20	Summons, service on municipal, sub. 2,	51
		on private, sub. 3	51
		on common carrier, sub. 3, 4	51
		on county, sub. 1	51
		on city or town, sub. 2	57
		constructive, when allowed, sub. 1	57
		Venue of action against bank or insurance company	71

Corporation—Continued.

Venue of action, against generally,	72
against common carrier	73
against foreign corporation	75
Verification of pleadings of, sub. 2,	117
Warning order against	57

Costs—

Actions unnecessary, plaintiff to pay	687
Agreed case in	639
Amendments, generally, sub. 5	113
after demurrer sustained	94
Appeal from quarterly and justices' courts, on	727, 728
Apportionment of in action to divide land or allot dower, sub. 13	499
Attachment in	199, 201
Attorney for non-resident plaintiff liable for	621
filing sham pleadings, liable for, sub. 8,	113
<i>Bond for, form of, page 626.</i>	
Bond to secure	616
Committee, liable for, sub. 2	37
Copying immaterial part of record, sub. 11,	737
Corporation other than bank to secure	616
Curator liable for, sub. 2	37
Demurrer resulting from	92, 93, 94
Dower to allot in action for, sub. 13,	499
Extension of time to plead, party asking to pay	107
Fees of attorney for absent defendant, taxed as, sub. 6	59
of guardian <i>ad litem</i> , to be taxed as, sub. 4	38
<i>Form of bond for, page 626.</i>	
Garnishee, when to pay	223
Guardian, liable for, sub. 2	37
<i>ad litem</i> , fees of, to be taxed as, sub. 4	38
In action for indemnity before debt due, sub. 1	247
Irrelevant and redundant matter, in pleading	121
Keeping property attached	219
deposited in court	305
in action for immediate delivery	190
Land to divide, in action for	499
Next friend, liable for, sub. 2	37
Non-resident attorney, fees of, taxed as, sub. 6	59
Non-resident, to secure	29, 616
Offer to compromise	634, 635
to confess judgment	640
Pleadings, filing sham, sub. 8	113
defective	113
irrelevant and redundant matter in	121
Party asking time to file	107
redundant	121

SECTION.

Costs—Continued.

Process, attachments not executed not to be taxed as	201
summons not executed not to be taxed as	41
Recovery by plaintiff of any part of land claimed by defendant, sub. 2	125
Resulting from failure to demur, sub. 2	92, 93
Security for, by non-resident	29, 616
in Court of Appeals	744
by guardian, curator, committee, next friend, sub. 2	37, 619
on substitution for officer of new party as defendant	32
transfer of plaintiff's right <i>pendente lite</i>	20
by corporation other than bank	616
Surety for, liability of on motion	444

SECTION.

Co-sureties—

Action by and against to compel payment of money not due	661
to compel payment of money not due	237
Attachment by if money not due, sub. 2	237
if money due	662
Motion by and against for money paid	444
proceedings on	449

Counter-claim—

Absent defendant against	413
Allowed only in answer or reply, sub. 3	111
Answer may contain	95
Assignee, against	19
Caption of answer or reply must mention, sub. 4	97
Caption of what to state	110
Defendant demanding is a plaintiff, sub. 36	732
may proceed on, though plaintiff dismiss action	372
Defined, sub. 1	96
Demand of is an action, sub. 34	732
Disclosed on examination to be allowed absent defendant	413
Dismissal of action does not prevent proceedings on	372
Failure to plead does not waive	17
Inferior courts in	720
Judgment on	97, 387
Need not be pleaded as defense	17
Plaintiff against whom demanded is a defendant, sub. 36	732
Pleadings that may contain, sub. 3,	111
Proceedings on against new parties, sub. 3,	97
against plaintiff, sub. 2	97

	SECTION.		SECTION.
Counter-claim—Continued.		Courts—Continued.	
Proceedings on in quarterly, justices' and police courts . . .	720	<i>Generally—</i>	
Relief on, provisions concerning, sub. 1	97	Trial by, of statement of law and facts separately	332
Reply may contain	98	of issues of law, sub. 1	313
Separate action on	17	<i>Circuit courts—</i>	
Summons on not necessary	97	Appeals to, from judgment of justices' court on award, sub. 9 .	451
Trial of	97, 372	from inferior courts, how taken .	724
		in forcible entry and detainer . .	463
Counting—		Appeals to generally, page 548.	
Days between acts, mode of	681	Change of venue in, page 571.	
County—		Having four judges (see COURTS HAVING FOUR JUDGES), p. 563.	
Summons, service of in action against, sub. 1	51	In continuous session (see COURTS IN CONTINUOUS SESSIONS), p. 557.	
County in which action may be brought—		Jurisdiction of, original, page 548.	
See VENUE OF ACTION	62	appellate, page 548.	
County in which defendant resides—		Special judges of, page 569.	
Judgment against on service in . .	79	Transfer of actions from	13
against on service out of	82	What the words embrace, sub. 14 .	732
against on service out of, generally	80	<i>City courts—</i>	
Summons out of, prohibited in certain cases	81	Jurisdiction of, page 551.	
County court—		Proceedings in, provisions as to, 700, 731	
See COURTS .		<i>County courts—</i>	
Court—		Action in for division of land and allotment of dower	499
Misconduct of, ground of new trial, 340		Appeal from, to circuit court, page 548.	
Reference of word, sub. 12	732	Change of venue in, page 573.	
Trial of issue by 312, 313, 331		Jurisdiction of, page 549.	
law and facts separately stated .	332	Process, from how directed	701
provisions of Code applicable to .	346	who may execute	701
Courts—		Settlement of accounts of fiduciaries in	471, 472
<i>Generally—</i>		When clerk of to act as clerk of quarterly court	708
Approval of commissioners' deeds by	398	<i>Court of Appeals—</i>	
Attachments pending in different courts, removal of to one . .	210	Appeals to. See APPEALS .	
Contempt of. See CONTEMPTS .		Judge of may reinstate attachment	270
Funds in, attachment of	307	may reinstate injunction	297
deposit of in bank generally . . .	307	Jurisdiction of, generally, page 547.	
Jurisdiction of generally (see JURISDICTION OF COURTS), p. 547.		over judgments of circuit courts	513, 514
To what the word refers, sub. 12 .	732	errors, motion to correct which must be made in lower court	516, 763
Trial by, of actions for division of land, sub. 10	499	<i>Courts having four judges—</i>	
of issue of fact in ordinary action, sub. 2	313, 318	Bail bond—appearance	566
of action for injury to person or character	331	Bonds of court officials—actions upon	567
manner of in actions generally . .	346	Branches—four	564
in actions for injury to person or character, sub. 2	331	assignment of cases	564
		judge of one branch may preside over another	565
		jurisdiction—how divided . . .	564
		mistake in selecting branch . . .	565

Courts—Continued.

PAGE.

Courts having four judges—

Commissioner—appointment	567
oath and bond	567
removal of	567
term of	567
Continuous session	564
Control over judgment for sixty days	566
Criminal branch	564
bail bond—appearance	566
grand jury	566
interpreter for	568
*summons returnable—when	566
term—what regarded as	566
General term—rules made at	566
order-book	567
times for holding	567
Grand jury for criminal branch	566
Interpreter for criminal division—	
appointed	568
oath administered to	568
presence at all sessions of court	568
qualifications	568
salary—limit	568
term	568
Judges—election—tie vote	563
assignment of	564
commissions	564
of one branch may preside over	
another	565
special judge	565
vacancy—how filled	563, 564
Judgment—control over for sixty days	566
Jurisdiction of different branches	564
assignment of cases	564
criminal cases	564
common and law cases	564
equity cases to chancery branch	564
Rules made at general term	566
Special judge in criminal branch	565
Summary proceedings—taxes on	
realty	566
Summons in criminal cases—when	
returnable	566
Taxes—collection by summary proceeding	566
Term—what regarded as	566
Transfer from court or docket	565
cases involving common fund	568
pending litigation—how distributed	567

Courts having continuous session—

Appeals granted within sixty days	562
Assignment of cases for trial	558
Bail bond and summons in criminal cases	558
Bail in civil cases—sufficiency	562
liability of receiver	562
Bills of exceptions—when prepared and signed	563

Courts—Continued.

PAGE.

Courts having continuous session—

Common law docket	553
when action placed on	569
Constructive—service	560
Control of judgment for sixty days	558
Counties in which to be held	557
second-class city and county seat,	
places of holding court	557
County seats, rule where there are	
two	557
Criminal and penal cases, terms for	558
Days for motions and trials	558
Depositions, taken on interrog-	
atories	561
how taken and certified	561
notice, rules	561
Dockets, rule docket	559
common law	559
equity and equity trial	559
Equity docket	559
equity trial docket, cases to be	
placed on	559
called when court pleases	559
cases city interested in	559
motions placed on	559
Grand juries, four each year	558
meetings, when two places for	
holding court	558
Interrogatories, when to be answered	561
Judgment, control for sixty days	558
granting appeals	562
vacation or modification	560
Judicial sales, deposit required	560
advertisement of	562
sale bonds	562
terms of	562
Juries, selection of	557, 558
Motions docketed	559
objection to sufficiency of bail	562
New trial in equity, when applica-	
tion to be made	560
Places of holding court, where two	
county seats	557
grand juries	558
jurisdiction, two county seats,	
consent	557
juries, selection of	557
Pleading, amendment of petition	560
answer, when due	560
filing with clerk, effect	561
subsequent to answer, filing of	561
Practice, prescribed	558
amendment of petition	560
answer, when due	560
appeals, granting of	562
assignment of cases	558
cases against cities	559
conform to that of courts with	
terms	563
depositions	561
failure to plead, action docketed	559
filing pleading with clerk	561

	PAGE.		SECTION.
Courts—Continued.		Courts—Continued.	
<i>Courts having continuous session—</i>		<i>Justices' courts—</i>	
Practice, interrogatories, when answered	561	Interrogatories in, to adverse party	716
motions	559	time of answering	717
objection to bail in criminal case,	562	effect of not answering	717
ordinary action, trial docket	563	provisions concerning	140, 151
pleadings admitted, effect	559	Judgment of, upon lost record	719
pleadings subsequent to answer	561	upon set-off or counter-claim	720
Process, defendant's answer, when due	560	Jurisdiction of, page 550.	
constructive service	560	Land not to be sold under execution from	722
criminal cases	558	how to be sold under judgment of	723
returning process	558	New trial in	714
warning order	560	Pleadings in, when to be oral	705
when returned, when two county seats	557	when to be in writing	705
Record of fiducial settlements	559	Process from, to whom to be directed	701
Revivor of actions, cause shown against	560	Provisional remedies in, trial of	721
warning order to allow sixty days	560	Record book of	715
Rule docket	559	Set-off, trial of	720
Rules of court judicially noticed	557	Subpoena from, how served	709
change in	558	punishment for disobedience of	538
Settlements of fiduciaries—records	559	Summons from, issuance of	39, 41
Summary proceedings as to taxes on realty	559	service of	47, 48
Terms—what regarded as	558	to what district returnable	710, 712
Two county-seats—court held at each	557	to whom directed	701
jurles—selection of	557, 558	when returnable	706
jurisdiction—consent	557	Testimony in equitable actions in	708
process when returnable	557	Trial in, time of	706, 707
Vacation or modification of judgment	560	of equitable actions	708
Warning order	560	by jury, when parties entitled to	713
<i>Fiscal courts—</i>		granting of new	714
Appeal from to circuit court	550	of provisional remedies	721
from to quarterly court	549	Transcript of execution and judgment	723
Jurisdiction of	550	in appeals from	724
<i>Justices' courts—</i>		Witnesses, continuance on account of absent	315
SECTION.		depositions of, when to be taken,	554, 555
Appeals from, how taken	724	personal presence of, how secured,	556
appellant entitled to copy of judgment	731	<i>Police courts—</i>	
costs upon	727, 728	Appeal from to quarterly court, page 549.	
interrogatories, to adverse party	718	(See further as to appeals police courts of the several classes, page 551.)	
option of appellee, trial concerning, quarterly court to, page 549.	730	Change of venue in, page 574.	
time of taking	729	Jurisdiction of, page 551.	
transmission of papers upon	725	Proceedings in — See JUSTICE'S COURTS, UNDER COURTS.	
trial of	726	<i>Quarterly courts—</i>	
Application of Code to	700	Appeals from, how taken	724
Attachments, trial of	721	to, see page 549.	
Change of venue in, page 574.		appellant entitled to copy of judgment	731
Continuance, affidavit for	315	costs upon	727, 728
Clerks of, duties and powers of justices as	702	interrogatories, to adverse party,	718
Counter-claim, trial of in	720	option of appellee, concerning trial of	730
District in which summons from to be returned	710, 712	from to circuit court, page 548.	
Docket of	704		
Evidence in equitable actions in	708		

Courts—Continued.

SECTION.

Quarterly courts—

Appeals from, time of taking . . .	729
transmission of papers upon . . .	725
trial of	726
Application of Code to	700
Attachments, trial of	721
Change of venue in, page 573.	
Continuance, affidavit for	315
Clerks of, duties and powers of justices as	702
Counter-claim, trial of in	720
District in which summons from to be returned	710, 712
Docket of	704
Evidence in equitable actions in . .	708
Interrogatories in, to adverse party, time of answering	717
effect of not answering	717
provisions concerning	140, 151
Judgment of, upon lost record . . .	719
upon set-off or counter-claim . . .	720
Jurisdiction of, original, page 549. appellate, page 549.	
Land not to be sold under execution from	722
how to be sold under judgment of, .	723
New trial in	714
Pleadings in, when to be oral . . .	705
when to be in writing	705
Process from, to whom to be directed	701
Provisional remedies in, trial of . .	721
Record book of	715
Set-off, trial of	720
Subpoena from, how served	709
punishment for disobedience of .	538
Summons from, issual of	39, 41
service of	47, 48
to what district returnable	710, 712
to whom directed	701
when returnable	706
Testimony in equitable actions in .	708
Trial in, time of	706, 707
of equitable actions	708
by jury, when parties entitled to .	713
granting of new	714
of provisional remedies	721
Transcript of execution and judgment	723
in appeals from	724
Witnesses, continuance on account of absent	315
depositions of, when to be taken,	554, 555
personal presence of, how secured, .	556

Courts having four judges—

See COURTS.

Courts in continuous session—

See COURTS.

(45)

Coverture—

See MARRIED WOMEN.

SECTION.

Creditor—

Attachment by—See ATTACHMENTS.	
Becomes a party, by presenting claim to commissioner	432
Claim of, against personal representative, lost by failure to present, .	433
against legatees or distributees, not lost by failure to present .	434
Injunction against, in action to settle estates	436
Lien of on interest in joint property levied on, sub. 3	660
may be enforced in equity, sub. 3 .	660
May have attachment against joint property	208, 209
May sue on lost note or obligation for settlement of decedent's estate	428
for settlement of trust estate . .	438
Must be made party if known to action to settle estate	428
ordered to appear before commissioner and prove claim . 430, 431	
Must make demand of personal representative before suit	437
Provisions as to creditors of decedent's estates apply to trust estates	438

Credits—

Fixed in order of sale by courts generally	696
--	-----

Cross-appeal—

May be prosecuted though appellant fails to appeal, sub. 3	755
Method of taking, sub. 1	755
When failure to take bars right of appeal, sub. 2	755

Cross-examination—

Of affiant on motion to discharge provisional remedy	548
witness	594, 595

Cross-index—

Judgment book of	392
----------------------------	-----

Cross-interrogatories—

What clerk must file, sub. 2	575
When party may file, sub. 1	575
clerk may issue commission to take depositions on	576

Cross-petition—

Allowed only in answer or reply, sub. 1	111
---	-----

	SECTION.		SECTION.
Cross-petition—Continued.		Dead person—	
Allowed for enforcement of lien stated in petition	692	Provision as to testimony against . .	606
Answer may contain	95	Death—	
Caption of, what to state	110	See REVIVOR.	
Defined, sub. 3	96	Of defendant does not discharge levy of execution, sub. 2	407
Pleadings that may be	111	does not prevent conveyance by sheriff, sub. 1	407
Prayer for relief in, sub. 1	97	does not prevent execution against survivor	405
Proceedings on, sub. 3	97	Of plaintiff does not prevent issue of execution	402
Provisions of Code applicable to . .	97	party does not prevent conveyance by commissioner, sub. 3	394
Reply may contain	98	cause for new trial	518
What parties allowed against, sub. 3,	96	De bene esse—	
Curator of person under disability—		Deposition of witness may be taken, and read, when	558 554
Action by	21, 35	Debts—	
against, sub. 2	35	Action for, before due	237
Affidavit of, for warning order . .	58	Arrest for, before maturity	238
Arbitration may be agreed to by, sub. 4,	451	Attachment for, before maturity . .	238
Cost, liability of for	37, 019	Maturing pending action, recovery on	135
Defense by, formal unnecessary . .	126	Not due, when lien for not enforced,	694
Depositions taken on interrogatories by consent of	572	Debtors—	
Notice may be served on	627	Arrest of. See ARREST AND BAIL.	
to, may be served on attorney . .	632	Judgment against, proceedings on . .	439
Pleadings, defensive need not be verified by, sub. 2	116	Debtors, joint—	
Dam—		See JOINT DEBTORS.	
Venue of action against contractor for work on	77	Decedents—	
Damages—		Settlement of estates of. See SET- TLEMENT OF ESTATES.	
Action for included by action for money, sub. 8	732	Testimony of persons for themselves against, subs. 2, 6, 7	606
Allegations concerning, which must be proved, sub. 4	126	Venue of action for settlement of estates of	65
concerning need not be verified, sub. 5,	116	for distribution and partition of estates of	66
Assessment of by court	379	Verification of claims against	437
in action for injury to person or character, sub. 1	331	Decision of court—	
on dissolution of injunction	295	See EXCEPTION.	
by jury, in action for personal property	330	Ground for new trial if erroneous . .	340
Excessive, grounds for a new trial, sub. 4,	340	Law and facts separately stated . .	332
Judgment for on failure to plead . .	379	Decisions of Court of Appeals—	
in action for personal property . .	388	Duties of reporter with reference to .	766
when given by statute	389	To be announced in writing	765
On affirmation of judgment or dis- missal of appeal	764	Declaration—	
on dissolution of injunction	295	See PETITION.	
Rate of recoverable	345		
Smallness of, when not grounds for new trial	341		
Verdict for, in action to recover per- sonal property	330		
Days—			
Mode of counting acts between . .	681		

	SECTION.		SECTION.
Decrees —		Defendants—Continued.	
See JUDGMENTS.		One or more may defend, if parties numerous	25
Deeds —		Persons claiming adverse to plaintiff may be made	23
Commissioners. (See COMMISSION- ERS.)	394	united in interest may be joined as	24
May be filed as exhibits	128	Substitution of plaintiff for officer sued as	32
oral proof of, sub. 2	552	Unknown, provisions concerning . .	691
Sheriff's after sale of property, sub. 1 may make after death of defend- ant, sub. 1	407	warning order against, sub. 7 . .	57
Default —		Defense —	
Judgment by, in action at law . . .	359	Allegation necessary for support of is material	127
in equitable action	360	Arising <i>pendente lite</i> , supplemental pleadings	135
for part of claim	380	Assignment of thing in action does not prejudice	10
assessment of damages before taking	379	Equitable must be pleaded in ordi- nary actions	17
Defect —		and legal may be united in plea, sub. 2,	113
In proceedings not affecting sub- stantial rights to be disre- garded	134	Infant, for	36
Defective bond —		Legal and equitable may be united, sub. 2,	113
New and sufficient bond may be ex- ecuted for	682	Partial may be pleaded, sub. 2 . .	113
Defect of parties —		Person of unsound mind for . . .	36
Ground for special demurrer, sub. 4, .	92	Prisoner for	36
Objection for, may be made in an- swer	118	Time of making, generally	102
if apparent, waived unless de- murred to, sub. 4	92	of making, if summons not served in time	104
Waived unless taken by demurrer or answer	92, 118	of making may be extended by court	107
Defendants —		of making by infant	391
Action for discovery of	685	extended to defendant construct- ively summoned	408
Assignors may be made	19	how reduced to one year for ab- sent defendant	415
Claimant to be made	29	absent defendant allowed five years to make	414
substituted for	30	Definite and certain —	
Committee, when to be	36	Pleadings to be	87
Curator, when to be	36	Definitions	732
Demanding set-off or counter-claim regarded as plaintiffs, sub. 36, .	732	Delay —	
Entitled to judgment on set-off or counter-claim	387	Appeal taken for delay, disposition of	759
to trial of set-off or counter-claim, .	372	Caused by transfer of action to equity, bond required	14
Guardian, when to be	36	Unreasonable examination of wit- nesses may be stopped . . 579, 593	
Injunction of judgment in favor of, Judgment against part of in action in contract	378, 27	Delivery of property —	
against part and continuance as to others	368, 370	See CLAIM AND DELIVERY.	
against one or more	369, 373	Demand —	
May proceed on set-off or counter- claim, if plaintiff dismiss ac- tion	372	Before suit, by creditor of dece- dent's estate	437
Means what persons, sub. 36	732		

Demand—Continued.

By pleadings, is action	2
Of counter-claim or set-off, is action, sub. 34	732
Relief. See RELIEF .	

Demurrers—

General	93
cost of failing to file paid by pleader	93
filing of, to part of pleading . . .	113
filing of in clerk's office generally, <i>Form of</i> , page 616.	109
overruled, pleading after	133
sustained, amendment after . . .	94
Special	92
<i>Form of</i> , page 616.	
ground for, may be stated in pleading	118
may be filed in vacation in office .	109
overruled, pleading after	133
sustained, amendment after . . .	94
waiver of, sub. 4	92
waiver of if filed in vacation, sub. 3, .	109

Denial—See **TRAVERSE**.**Departure—**

In pleading forbidden	101
What is not	101
From State, to defraud, grounds of attachment	194
ground for warning order, sub. 3, about to be made to defraud, ground for arrest, sub. 4 . . .	153

Deposit in bank—See **BANKS**.**Deposit in court—**

By arrested debtor, effect of . . .	159
garnishee, effect of	223
or officer of corporation, when required	325
party when required	303
How enforced	304
May be confided to sheriff	305, 306
placed in bank	307
when may be loaned out	308

Depositions—

Actions out of this State, in	591
Adjournment of taking to another time	568
to another place	569
explanation of cause of	570
Amendment of officer's certificate, sub. 3,	588

SECTION.

Depositions—Continued.

Answers to interrogatories may be read as	140, 141
may be read as, in ordinary action, .	146
Caption of interrogatories, what must state	575
Certificate of officer taking	582
amendment of, sub. 3	588
<i>Form of</i> , page 644.	
Commencement of taking	557
Commission to take, to whom to be directed	577
when to be issued	576, 577
<i>Form of</i> , page 645.	
Consent to taking of upon interrogatories	572
Copies of lost may be used	552
Cross-interrogatories, by clerk, sub. 2, by party	575, 576
<i>De bene esse</i> , taking of	558
using of	558
Defined	545
Delay, unreasonable in examination, officer may prevent	579
Divorce cases in	574
Examination of witness, mode of .	579
Examiners	559
office of	560
powers of	561, 562
Exceptions to, manner of taking . .	586
time of taking	587
when to be decided	588
waiver of error in decision concerning	589
Fees, pre-payment of to examining officer	583
when pre-payment of not required for issuing and serving subpoena .	584
Filing of interrogatories	575
cross-interrogatories, by clerk . .	575
cross-interrogatories, by party, .	576
<i>Forms of caption and certificate</i> , p. 644. .	
Guardian <i>ad litem</i> may take	38
Insulting questions, not to be asked .	579
Interrogation, unreasonably long of officer may prevent	579
Interrogatories, caption of what to state	575
filing of	575
notice of filing of	575
taking of on, when court may permit or require	573
of on, when party may require of on, when necessary (see AMENDMENT)	574
of on, who may consent to	572
of on, neither party to be present .	581
Lost copies of may be used	552
Name of witness, when to be stated in notice	566
and residence in caption of interrogatories	575

SECTION.

Depositions—Continued.	SECTION.	Depositions—Continued.	SECTION.
Notice of filing interrogatories . . .	575	Taking of, by what officers, authorized out of this State . . .	504
when service authorizes taking on interrogatories	571	presence of parties at, when forbidden	581
requisites of	566	Testimony to perpetuate, who may take	610
service of	624, 625	how taken	612
punishment of officer for failure to serve	633	may be used when and how . . .	613
name of witness to be stated in, when	566	copies of, may be used when . . .	614
what is reasonable	567	provisions as to that heretofore taken	615
when adjournment of taking, allowed on	568, 569	Witnesses, competent to give . . .	605
Objections to questions to be decided or noted by officer . . .	579	not bound to go out of county to give	534
Officers authorized to take, in this State	562	whose depositions must be taken .	554
authorized to take out of this State	564	personal presence of in court, how secured	556
powers of, in conducting examinations	579	Writing of by witness or examiner .	580
power to compel witnesses to testify	535, 539	Depositories—	
Party can not give for himself after taking evidence, sub. 4 . . .	606	Of money paid into courts generally	307
may be compelled to give as any other witness, sub. 10 . . .	606	Remedies against generally	788
Persons whose depositions may be used in any case	554	Deputies—	
how compelled to testify in court,	556	Ministerial officers generally . . .	678
Postage on payment of to examining officer	583	Destruction—	
payment of to clerk before returning to	588	Of property in forcible entry and detainer, may be enjoined . .	467
Presence of parties not allowed at taking on interrogatories . . .	581	Detainer—	
Prisoner when and how deposition of to be taken	540, 541	(See FORCIBLE ENTRY AND DETAINER)	452
Purposes for which may be used . .	552	Determination—	
for which must be used	552	Of court or officer how pleaded . .	122
Questions insulting officer may prevent	579	What, is a judgment	368
Rebuttal in, may be taken without leave	553	Detinue—	
Residence stated in caption of interrogatories	575	(See CLAIM AND DELIVERY) . . .	180
Retaking of, leave necessary for . .	553	Devises—	
Return of, to examining officer to amend certificate	588	Are real representatives of decedents, sub. 18	732
Sending of by examining officer to clerk	583	Disability—	
Subpoena for witness	578	See INFANTS, MARRIED WOMEN, PERSONS OF UNSOUND MIND, PRISONERS.	
disobedience of, how punished,	535, 538	Meaning of word, sub. 31	732
fees for issuing and serving . . .	584	Discharge—	
Taking of, adjournment of	568	Of attachment, by bond to perform judgment	221
commencement of	557	upon motion, on merits	265
commission for	577	upon motion for irregularity . .	268
on interrogatories, when	571	upon rendition of judgment in action when order of, is final	266, 267
on interrogatories	574		
on notice	565		
by what officers, authorized in this State	562		

Discharge—Continued.

Of jury without agreeing	322
levy of execution, by injunction bond	378
levy of distress warrant	653

Disclosure—

See DISCOVERY.

Defendant in action for personal property may be required to make	193
Of defendant in action to enforce judgment	443
claimant as to property attached	220, 257
garnishee to officer	205
garnishee to court	224, 226
plaintiff in action against non-resident	412
plaintiff of set-off or counter-claim	413

Discontinuance—

Of action by plaintiff does not prevent trial of set-off or counter-claim	372
generally by court	28
by court or party	371
Of appeal does not prevent prosecution of cross-appeal, sub. 8	755
When necessary on first day of term	363

Discount—

Defendant's right to not prejudiced by assignment, when	19
of interest in judgments for debt not due, sub. 8	247

Discovery—

See DISCLOSURE.

Action for, allowed, to enforce judgment	439
allowed to learn name and residence of joint debtor	685
Defendant and garnishees, when compelled to make	443
of evidence, ground for new trial, sub. 7,	340

Dismissal—

Of action, as to some defendants, and trial as to others	363
in equity as to part of defendants, does not prevent trial of set-off or counter-claim	372
error as to form of, not cause for, for failure to secure costs	8, 617
without prejudice by court for want of parties	28, 371
by plaintiff without prejudice before submission	371

SECTION.

Dismissal—Continued.

Of any cause of action by court without prejudice	371
by plaintiff before submission	371
Of appeals, damages on	764
does not prevent prosecution of cross-appeal, sub. 3	755
proceedings on in court below, sub. 1,	761

SECTION.

Disobedience—

See CONTEMPTS.

Disposition—

Fraudulent of property, is ground for attachment	194, 237
--	----------

Dissolution—

See INJUNCTION.

Distress for taxes—

Attachment of property held by officer under	203
duty of officer	204

Distress warrant—

Action for property taken under	33
substitution of plaintiff for officer sued	32
Appraisement of property distrained	646
Bond to discharge levy of	653
to officer before levying	652
to suspend in part	658
motion on	654
defense that may be made to	654
trial of in justices' court	655
trial of in court	656
Claimant of property distrained, bond of	652
judgment on	657

*Form of warrant and bonds allowed under, page 642.***Distributees—**

See LEGATEES AND DISTRIBUTEES.

Distribution—

Venue of action for	66
-------------------------------	----

District—

To which summons from inferior court is returnable	710, 712
--	----------

Division of land and allotment of dower—

Action for may be transferred from county to circuit court, sub. 11,	490
--	-----

	SECTION.
Division of land and allotment of dower— <i>Continued.</i>	
Appeals to Court of Appeals in actions for, sub. 12	499
Case to be tried as ordinary action, but without jury, sub. 10	499
removal of, from county to circuit court, sub. 11	499
Circuit or county court has jurisdiction, sub. 1	499
Commissioners to make division, appointment of sub. 4	499
duties of, sub. 6	499
two may act, sub. 9	499
compensation of, sub. 15	499
to convey according to division, sub. 7,	499
Costs to be apportioned between parties, sub. 13	499
County court has jurisdiction, sub. 1,	499
Deeds, by whom made, sub. 7	499
to be recorded, sub. 8	499
Equity jurisdiction not affected by Code, sub. 16	499
Guardian may file petition for, sub. 2,	499
Parties, all persons interested to be made, sub. 3	499
Petition for, who may file, sub. 2	499
contents of, sub. 1	499
Transfer of case from county to circuit court, sub. 11	499
Verification of pleadings not required, sub. 14	499
 Division of real property—	
Before sale for debt, sub. 1	694
In action to sell property of person under disability, sub. 7	494
 Divorce—	
See ALIMONY.	
Action for, to be in equity	420
Allowance of maintenance in, <i>pendente lite</i>	424
Annulment of judgment in	426, 427
Appeal not allowed from order granting, page 547.	
Depositions in need not be taken on interrogatories	574
what certificate of officer to must state	422
Interrogatories as to property	421
Judgment in, how annulled	426, 427
for restoration of property	425
can not be set aside after term	344
Maintenance allowance of <i>pendente lite</i>	424
how payment of enforced	424
Petition, allegations of must be proved	422
what facts must be stated in	423
Pleadings in need not be verified	421

	SECTION.
Divorce—Continued.	
Property, restoration of	425
questions concerning answered on oath	421
Residence of parties must be proved,	422
Venue of action	76
Wife, how to sue and be sued in	34
 Dockets—	
<i>Court of Appeals—</i>	
Appeals may be entered on when,	740
arrangement of, on, sub. 1	754
printing and distribution of, sub. 2,	754
<i>Circuit court—</i>	
Common docket, arrangement of cases on	349
entry on, of actions	348
entry on of return of summons	670
entry on of traverses in forcible entry	465
must show parties and attorneys	353
must show whether summons served in time, and issues formed	354
transfer of issues or actions, to or from. See TRANSFER.	
trials to be according to order in which action stand on	314
when to be called for trial of issues	358
when to be called for pleadings	359
Equity docket, entry on of actions	351
entry on of return of summons	670
must show names of parties and attorneys	353
transfer of issues to and from. See TRANSFER.	
trial to be in order in which actions stand on	314
when to be called for trial	357, 358
when to be called for pleadings	360
Motion docket entries on	352
entries on are motions	362
must show names of parties and attorneys	353
must show date and object of motions	355
to be called first hour each day	356
<i>Justice's docket—</i>	
one docket	704
service of summons to be entered in full	670
trial of actions in order in which they stand on	314
 Doors—	
Breaking of by officer to execute attachment	675
to execute order of arrest	676

	SECTION.		SECTION.
Dower—		Equitable actions—	
(See DIVISION OF LAND AND ALLOTMENT OF DOWER.)	499	Alimony or divorce	420
Jurisdiction of equity to allot not changed by Code, sub. 16	499	Answer, when to be filed	102-106
Sale of, provision as to	495	Bringing of, by one or more for several	25
When court may order compensation	495	Defense of, by one or more for several	25
court may direct sale of	495	when to be filed	102, 104
Education—		Description of, in caption of petition, sub. 2	110
Board of, venue of action against .	68	Discovery of property, for	439
Ejectment—		of names of defendants	685
See LAND.		Dismissal of as to some and trial as to others	367
Description of land in action of . .	125	Divorce or alimony	420
Recovery of any part, defendant to pay costs	125	Dower, allotment of, sub. 16	499
Election—		Errors as to form, not to cause dismissal	8
As to causes of action improperly joined	85	correction of, by plaintiff	9
Between inconsistent pleadings, sub. 4.	113	correction of, by defendant, sub. 1. .	10
Privilege from arrest while attending	606	correction of, by court, sub. 3 . .	10
Elisor—		waiver of	15
May serve process, amendment to .	667	Evidence in, to be by deposition . .	552
Enclosure—		oral evidence in	552
See INCLOSURE.		Exhibit in, constitutes part of record, when, sub. 2	128
Enforcing satisfaction of judgments—		General provision as to	6
Action for, upon return of <i>nulla bona</i>	439	Indemnity, by sureties, before debt matures	237
attachment allowed without affidavit or bond	441	after debt matures	661
discovery of property, how enforced	443	Injunctions, generally	271
garnishees, answer of to be verified	440	of judgment less than \$25 forbidden	284
lien on defendant's property, how acquired	442	Issue out of chancery trial of	11, 12
surrender of money or property in	443	Interrogatories in	140
venue of	70	Judgments, to enforce satisfaction of	439
verification of answers, to be made in person	440	to enjoin	285
English language—		against part of defendants, when allowed	367
Pleadings must be in	115	correction of ordinary forbidden, to be on merits	371
Entries—		Justices' courts in	708
Original, in account book, testimony of party as to	606	Land, to allot, sub. 16	499
Entry—		Legal and equitable causes joined, sub. 2.	113
(See FORCIBLE ENTRY AND DETAINER.)	452	Lost writing on	7
		May be against part of defendants .	26
		against part of defendants jointly bound	27
		Ordinary judgment not corrected in	17
		Police courts in	708
		Quarterly courts in	708
		Reply when to be filed	105
		Sale of real property of infants, for, of joint owners, for	490
		Satisfaction of judgment, for	439
		Settlement of decedent's estates . .	428
		of trust estates	438
		Sureties by, before debt matures . .	237
		after debt matures	661
		Time of filing defense in circuit court	103

	SECTION.		SECTION.
Equitable actions—Continued.		Escape of arrested debtor—	
Time of filing, when summons not served in time	104	Liability of officer for	174
Time of reply and subsequent pleadings in circuit court	106	how fixed	176
may be extended by court	107	Estates of decedents—	
Transfer of from one docket to other	8	See SETTLEMENT OF ESTATES.	
ordinary docket to	8, 9, 10	Estates in trust—	
docket from	10	See SETTLEMENT OF ESTATES.	
attachments in different courts	210	Estate, vested—	
court may order	10	Is included by word property, as used in Code, sub. 11	782
waiver of right to	15	Estoppel—	
bond when required before	14	Pleading of, in answer, sub. 2	95
for trial of issue	12	in reply, sub. 2	98
Trial of, in motion hour	357	in subsequent pleadings	100
issues in	361	generally, sub. 2	118
plaintiff may demand when	366	express admission of facts not necessary in, sub. 6	118
as to part of defendants	367	rejoinder may contain	99
on third day of term	360, 361	reply may contain plea	98
when they stand for	364	Evidence—	
when interrogatories annexed to pleadings	365	Absent defendant, sub. 8	606
if no issue made by answer	366	Adverse party required to give, sub. 10,	606
if part of defendants only, summoned	367	Affidavit by	548
		provision as to, sub. 11	606
Equitable defense—		Answer to interrogatories—(See INTERROGATORIES.)	140
Defendant pleading to give bond before transfer	14	Assignor of claim when incompetent, sub. 9	606
Not ground for enjoining judgment in ordinary	17	Attachment trial in	263, 264
Equity—		Attesting witnesses, provision as to, sub. 11,	606
Transfer of ordinary action to	10	Attorney, when not to testify, sub. 5,	606
court may order	10	Books, entries in, provision as to, sub. 7,	606
generally	11	Burden of proof who has	525, 526
Error—		party holding to introduce first	317
See NEW TRIAL.		in action to recover land	125
As to form of action, correction of	9	Competency of witnesses generally,	605, 606
not cause for dismissal or abatement	8	Contradiction of witness	596, 598
may be cured by transfer	10	Dead person against, sub. 2	606
waiver of	15	Depositions may be read as	548, 552
Grounds for new trial	340	copies of may be read as	552
In assessment of amount of recovery, ground for new trial	340	Equitable actions in	552
Judgment reversed for	514	oral testimony in	552
modified for	514	Exhibits, proof of	552
Motion to correct, when necessary before appeal	516, 768	Examination of witnesses	593
Not affecting substantial rights disregarded	134, 338, 756	direct	594
Of law, excepted to, ground for new trial	340	cross	594
Waiver of, as to decision upon exceptions to depositions	589	leading questions, when permitted,	595
as to misjoinder of causes of action	86	Good character, evidence of	599
as to proceedings adopted	15	Handwriting, proof of disputed	604
		Husband and wife, provision as to, sub. 1,	606

Evidence—Continued.

	SECTION.	
Impeachment of witness . . .	596, 598	
Infant against, sub. 2	606	
Injunction on trial of	291	
Interrogatories, taking by	140	
Introduction of	317, 525	
order of	592	
Judge may testify	608	
Juror may testify	608	
Jury, how informed as to after sub-		
mission	321	
Leading questions, when permitted	595	
Lunatic against, sub. 2	606	
Minister, when not to give, sub. 5 .	606	
Modes of taking	548	
Newly discovered ground for new		
trial	340	
Non-resident against, sub. 3	606	
Not to be stated in pleadings . . .	119	
Order of introduction of	592	
Party may be required to give . . .	149, 606	
Perpetuation of	612, 615	
Person present may testify	602	
Priest when not to give, sub. 5 . . .	606	
Prisoner for or against, sub. 8 . . .	606	
may testify	540, 541	
Rebutting evidence	317	
Re-examination of witness	600	
Return on summons entry of is . . .	670	
Separation of witnesses	601	
Subpoena defined	528	
<i>duces tecum</i>	528	
clerk to issue	529	
who may issue	530, 531	
execution of	532, 533	
acknowledgment of	533	
Verdict not sustained by, set aside .	340	
Wife and husband, provision as to,		
sub. 1,	606	
Witnesses liable for costs, when . .	536	
damages, when	536	
arrest of	537	
action against, when not allowed,	542	
competency of, generally	605, 606, 607	
subpoena for	528	
Writings, proof of, disputed	604	

Examination—

Leading questions in	595
Of defendant or claimant, concern-	
ing property attached	220
concerning specific property order-	
ed to be attached	257
in action for personal property . .	198
garnishee, concerning property at-	
tached	225
plaintiff as to claim against ab-	
sent defendant	412
Oral, defined	546
Party having burden must begin,	
sub. 3,	317
Re-examination of witness with	
leave	600

Examination—Continued.

Re-examination of witness whose	
deposition has been taken	
when allowed	553
except in rebuttal, amendment to.	553
Separation of witnesses during . .	601
Witnesses of, court to control . . .	593
direct and cross of, defined	594
direct of, must be completed be-	
fore cross begins	594

Examiners—

Appointment and oath of	559
Embrace what person, sub. 38 . . .	732
Not required to leave office	563
Office of, where to be kept	560
Powers of concerning administering	
of oaths	561
concerning taking of affidavits . .	549
concerning taking of depositions,	562

Exceptions—

Bill of, when to contain all the evi-	
dence, sub. 2	335
how prepared	335
<i>Form of bill</i> , page 645.	
bystander's bill	337
controverting by affidavits	337
certificate of judge to	337, 339
when to contain substance of evi-	
dence, sub. 1	335
instruments of like character,	
how copied in, sub. 3	335
party to prepare and present to	
judge, sub. 1	337
time may be given to prepare,	
sub. 2,	337
to include all decisions excepted	
to, sub. 2	337
to be signed by judge, sub. 3 . . .	337
may be corrected by judge, sub. 3 .	337
how attested by affidavits of	
bystanders, sub. 3	337
affidavits controverting to be filed	
in office, sub. 4	337
when judge to certify that it con-	
tains all the evidence	339
Certifying of bill of	337, 339
Decisions of court to, how taken,	338,
Depositions, amendment of certifi-	
cate	588
how to be taken	586
when to be taken	587
when to be decided	588
waiver of error in decision upon .	589
Entry of on record sufficient	336
Form of bill of, not particular,	
sub. 1,	335
How taken, generally	15, 333
to error as to form of action . . .	15
to decision entered on record . . .	336
May be supported and controverted	
by affidavits, sub. 3	337

Exceptions—Continued.

Not to be regarded unless substantial	388,	756
Preparation of bill of	385	
<i>Rules for preparing bill, page 646.</i>		
Time of taking	384	
reducing to writing	384	
to reduce to writing may be given, sub. 2,	387	
for preparing bill of, may be allowed, sub. 2	387	

Exchange, bill of—

See BILL OF EXCHANGE.

Executions—

Action on return of "no property" of	489
Against body of defendant	168
<i>Form of, page 638.</i>	
Bond of indemnity before levy of	641
before sale under	642
to obtain discharge of levy of	278
to obtain suspension of sale under, appraisalment before taking	645
objection to appraisalment	649
to what court returnable	641, 651
motion on against obligors	648
motion of obligor to discharge	650
does not release levy	650
<i>Form of, page 640.</i>	
Claimant of property levied on, bond of	645
Death of party to judgment, effect of (see REVIVOR)	401
Defendant not having property subject attachment	194
proceeding against on return of <i>nulla bona</i>	489
of <i>nulla bona</i> from justice's court	723
Discharge of levy of, by injunction bond	278
by bond to suspend sale under	645
Forms of bonds under. See FORMS.	
Issuing after death of plaintiff in	402
after death of one defendant against survivor	405
on judgments generally	401
on bond for money attached	232
on bond for purchase money, sub. 3,	697
Joint property, levy of on interest in	660
appraisalment of property levied on	660
lien on property levied on	660
return of officer	660
when officer may repossess himself of property	660
Justice's court, land can not be sold under	722

SECTION.

Execution—Continued.

Justice's court, transcript of, from	723
how land sold under, from	723
proceedings on, after return of <i>nulla bona</i>	723
Levy of, indemnity to officer making, on interest in joint property	641
how discharged by injunction	278
not discharged by execution of bond	650
Motion to release levy of	650
Officer, bond of indemnity prevents suit against	648
Quarterly court, land can not be sold under, from	722
Replevy of, not allowed on bond in attachment case	282
on sale bond not allowed, sub. 3,	697
<i>Form of bond, page 641.</i>	
Sales under, indemnity to officer before making	641
suspension of	645
of interest in joint property forbidden	650
when to be for cash	282
to be for cash on sale bonds, 697-3,	829
Surplus to be returned to court	644
court to make disposition of	644
Trial of right of property abolished,	659

SECTION.

Executors—

See REPRESENTATIVES.

Exemption—

Of property from attachment	200
---------------------------------------	-----

Exhibits—

Action based on must be filed or accounted for	120
as evidence may be filed	128
Genuineness of, when admitted	527
Of like character, statement of in bill of exceptions, sub. 3	335
statement of in transcripts, sub. 8,	787
Oral proof of, sub. 2	552

Existing actions—

Provisions of Code which apply to	387
---	-----

Exonerations—

See ARREST AND BAIL.

Expenses—

See COSTS.

Express admission—

Not necessary in plea of avoidance or estoppel, sub. 6	118
--	-----

	SECTION.		SECTION.
Fact—		Fiduciaries—Continued.	
Issue of, arises how	810	Settlement of accounts of, in county court	471, 472
how to be tried	812, 818	may be recorded	472
pleadings necessary to form allowed, sub. 1	89	Statutes, provisions of adopted as to,	471
trial of by court	812, 818, 831	Venue of actions by and against 66,	67
separation of law and fact	832		
Facts—		Filing—	
Occurring after pleading, supplemental allowed	185	See EXHIBITS—PLEADING.	
when supplemental proceedings unnecessary	185	Exhibits, foundation of action	120
Of which judicial notice is taken need not be stated in pleadings, sub. 1	119	relied on as evidence	128
Proved, conforming pleading or proceeding to	129, 184	Papers, time of, to be indorsed by clerk	669
Failure of proof—		Pleadings in clerk's office, in equitable action	104
Variance, which is deemed to be	181	in actions generally	108
Failure to plead—		demurrer with	109
See PLEADING.		Supplemental	135
Fees—		on demurrer being overruled	133
For issuing subpoenas and summoning witness	584	time of. See PLEADING.	
issuing warrant of arrest and executing it	584	Writing relied on as evidence	128
Of attorney for absent defendant, sub. 6,	59	foundation of action	120
in Court of Appeals	786	Final orders—	
commissioners to divide land, allot dower, sub. 15	499	Judgments are	368
examining officer for taking depositions	588	Mode of appealing from	734
guardian <i>ad litem</i> , sub. 4	38	Orders concerning receivers are	298
Person appointed by court to serve process	668	concerning mandamus, which are, concerning attachments, which are	475
Female—		When motion made to correct before appealing from	266, 763
See MARRIED WOMAN.		Fine—	
Interrogatories to, in ordinary action, sub. 2	148	Affidavit to obtain order of delivery to state property was not taken for, sub. 5	181
Femes covert—		Venue of action for recovery of, sub. 1,	63
See MARRIED WOMAN.		Fiscal court—	
Feminine gender, sub. 2	732	Appeal from to circuit court, page 548	
Fiduciaries—		Jurisdiction of, page 560	
See SETTLEMENT OF ESTATES.		Force—	
Actions, for settlement of decedent's estate	428	"Prevented by" not sufficient return on process	677
for settlement of trust estates	438	Foreclosure—	
by generally	21	Of mortgage forbidden	375
Liability for costs, sub. 2	37	Forcible entry and detainer—	
		Detainer defined	462
		Does not bar action for trespass	468
		Forcible entry defined	462
		Inquest of jury upon	469
		Judgment on return of inquest	460
		and execution from circuit court, form of	466
		Judge or justice to try	460

SECTION.	
Forcible entry and detainer—Continued.	
Jury trial not necessary	454
not to be summoned unless	454
Limitation of	469
Oath to jury	456
Papers to be preserved	462
return of by justice to circuit court	468
Proceedings if jury disagree	459
Rent proceedings do not bar recovery	468
Traverse in and bond	468
liability of obligors in bond	464
trial of	466
damages recoverable on	464
judgment and execution on	466
restraint of waste pending	467
time to file	468
transcript fee for	462
Verdict	459
Warrant, form of	454
how executed	455
return of	456
of restitution	461
Waste pending traverse restrained,	467
Witnesses' attendance, how secured,	458
subpoena for	458
Writ of, form and substance of	454
service of	455
trial of	454, 456
Foreign corporations—	
See CORPORATION.	
Actions against. See CONSTRUCTIVE SERVICE; WARNING ORDER.	
Attachment against property of	194
Defined, sub. 21	782
Service of summons on	51
Venue of action against	72-75
Warning order against	57
Forfeiture—	
Holding office after act of, is usurpation	486
Venue of action for recovery of, sub. 1,	68
Form of action—	
Error as to, not cause for dismissal or abatement	8
correction of, generally	9
correction of, by transfer	10
waiver of	15
Exceptions, provisions concerning, sub. 1,	385
Pleadings	88
Forms—	
Affidavit—	
Agent or attorney of	PAGE. 627
Arrest, order of to obtain	629

PAGE.	
Forms—Continued.	
Affidavit—	
Attachment to obtain	638
Claims against decedent's estate, 628,	629
Defendant moving to transfer to equity, to require to give bond	627
Delivery of personal property, order of to obtain	630
Guardian <i>ad litem</i> , to appoint	627
Party by	627
Pleading to require party to verify,	628
Sureties on bonds, as to sufficiency of	629
Warning order, to obtain	628
Answers	617 to 622
Appeals—	
Appeal bond to inferior courts	651
Order granting appeal to Court of Appeals	650
Summon on appeal from inferior court	651
Supersedeas bond	650, 651
Supersedeas	650, 651
Appraisement—	
Property taken under attachment	635
Property taken under execution	640
Property taken under distress warrants	648
Property taken under order of delivery	632
Arrest—	
Affidavit to obtain order of	629
Bond of plaintiff	629
Bond of bail	630
Order of	630
Warrant of, against witness	648
Attachment for rent—	
Affidavit to obtain	635, 636
Bond of plaintiff	636
Order of	636
Attachment—	
Affidavit to obtain	638
Appraisement	635
Bond to discharge	635
Bond of indemnity to sheriff	634
Bond to joint-owner	634
Bond to have property forthcoming,	635
Bond of plaintiff to obtain	633
Notice to garnishees	634
Order of attachment	638, 634
Bill of exceptions and rules preparing, pages 645, 646.	
Bonds—	
Appeal to circuit and quarterly courts	651
Arrest to obtain order of	629
Attachment in	634, 635

Forms—Continued.

PAGE.

Bonds—

Attachment to obtain	638
Attachment for rent to obtain . . .	636
Bail bond	630
Claimant's bond, to suspend sale under execution or distress . . .	640
Costs for	626
Defendant before action transferred to equity	625
Defendant to retain property taken under order of delivery . . .	632
Forthcoming of attached property, for	635
Indemnifying bonds	640
Indemnity to sheriff before levying attachment	634
Injunction to obtain	636, 637
Joint owner of attached property to, by plaintiff	634
Non-resident to, before judgment against	626
Plaintiff before suing on lost obliga- tion	625
Refunding bond	626
Replevin bonds	641
Sale bonds	626, 641, 643
Supersedeas bond on appeal to Court of Appeals	650
on appeal to circuit court	651
Suspend sale where property of less value than rent	642
Tenant to discharge distress war- rant	643
Witness for appearance of, under arrest	644
<i>Capias ad satisfaciendum</i>	639
<i>Claim and delivery of property—</i>	
Affidavit to obtain order of	630
Affidavit of surety as to sufficiency	629
Bond of plaintiff	631
Bond of plaintiff, when property taken under execution	632
Bond of defendant to retain	632
Order of	631
<i>Demurrers</i>	616

Depositions—

Certificate of examiner	644
Commission to take on interroga- ries	645
Notice	644
Subpoena for witness	644
Warrant of arrest for witness . . .	644

Distress warrants—

Appraisalment, form of	643
Bond to discharge	643
Bond of indemnity to sheriff before levying	642
Bond of claimant	642
Bond to replevy	642

Forms—Continued.

PAGE.

Distress warrants—

Form of warrant	642
Sale bond under	643

Executions—

Forms of	638, 639
--------------------	----------

Garnishees—

Notice to	634
---------------------	-----

Injunction—

Bond of plaintiff to obtain	636, 637
Order of	637

<i>Judgments and orders</i>	647 to 649
---------------------------------------	------------

Justice of the peace—

Execution, form of and bonds under, 638-642	
--	--

Summons issued by	644
Subpoena issued by	628

Petitions—

Account on	599
Administrator by and against . . .	596, 597
Alimony for	609
Assault and battery	601
Assignee against payor of note . . .	598
Assignee against assignor	604
Attachment bond on	604
Bill of exchange on	607
Contract for breach of	599, 603
Corporation by or against	598
Decedent's estate to settle	611
Division of land	613
Divorce for	606
from bed and board	609
Ejectment	601
Guardian's bond on	606
Fraud or deceit	603
Fraudulent conveyance to set aside, 611,	613

Guardian's bond on	606
Indemnifying bond on	606
Infants' real estate, sale of	614, 615
Insurance policy on	608
Libel for	600
Lien on land to enforce	612
Lost note on	598
Malicious prosecution	600
Merchant's account	599
Mortgage lien to enforce	610
Negligence of common carrier . . .	606
New promise	607
Note on	598
Personal property for recovery of .	602
Promissory note on	598
Railroad company for killing cattle, for negligence	606
Recovery of land	601
Sales of infants' real estate	614, 615
Seduction	600
Settlement of decedent's estate . .	611
Slander	599

	PAGE.		SECTION.
Forms—Continued.		Fund in court—	
<i>Petitions—</i>		Attachment of	207
Surety against principal	601	Deposit of, generally	307
Trespass to realty	601	Loan of	308
Upon return of "no property"	610		
Warranty for breach of	603	Garnishees—	
Work and labor	599	Action and attachment against	227
<i>Pleadings—</i>		action against when to be dis-	
Verification of by principal	627	missed, sub. 2	228
Verification of by agent or attorney,	627	on return of "no property" against,	439
<i>Replevin bonds</i>	641	Answer by	224, 226
<i>Replies</i>	622	Answers of to be verified in person,	440
<i>Sale bonds</i>	626, 641, 643	Appearance by	224
<i>Subpœna</i>	643	Attachment how executed on, sub. 8,	203
<i>Summons</i>	624	Attachment of property of	227
<i>Supersedeas</i>	650, 651	Bond of, for money attached	225
<i>Venditioni</i>	639	enforcement of	225
<i>Verification</i>	627	Costs, when allowed to	223
<i>Warning order</i>	625	Disclosure by, or proof against	226
		punishment of for failure to make,	226
		Duty of to furnish statement to of-	
		ficer	205
		punishment for failure so to do	205
		Execution of attachment upon, sub. 8,	203
		Liability of for money or property	
		attached	225
		Lien, created by service of sum-	
		mons	442
		Payment of money by	223
		Proof may be heard against	226
		Punishment of for failing to give	
		information to sheriff	205
		for failing to appear	226
		Service on, how made, sub. 8	203
		Summoning of	199
		duty of when summoned	203
		Summons, when lien created by,	
		service of on	442
Forthcoming bonds—		Gender—	
By party seeking to enjoin execu-		Each includes every, sub. 8	732
tion	278		
Joint owner of property levied on,		General attachments—	
sub. 4,	660	See ATTACHMENTS.	
For attached property	214, 258		
Provisions as to defense to	216	General demurrers—	
Sureties not released by bankruptcy		See DEMURRERS.	
of principal	693		
Foundation of cause of action—		General interest—	
Writing constituting, to be filed or		Action by or against one or more	
accounted for	120	for all	25
Franchise—			
Usurpation of. (See REPEALING OR		General verdict—	
VACATING CHARTERS.)	480	See JURY.	
Fraud—			
Attachment to vacate purchase ob-		Genuineness—	
tained by	250	Of writing filed with pleading when	
allowed in other cases	194	admitted	527
New trial allowed for	518		
Fraudulent purchase—			
Attachment in action to cancel	250		
Freehold—			
Owner may have reversion or re-			
mainder sold	491, 492		
Friend—			
See NEXT FRIEND.			

	SECTION.		SECTION.
Governor of Kentucky—		Guardian ad litem—Continued.	
Evidence of must be taken by depo- sition	554	Depositions taken by without pre- payment of fees	583
when personal presence of as wit- ness required	556	Duty of as to preparing case, sub. 3,	38
		may take depositions, sub. 3	38
Guardian—		Fees of, to be taxed as costs, sub. 4,	38
Action by, may be brought in his own name	21	Infant for	36
for persons under disability	35	Married woman, prisoner or insane, sub. 6,	34
for division of land	499	Must be practicing attorney, sub. 2,	38
against ward for sale of real prop- erty	489, 491	Notice to	627
against by ward, sub. 3	36	when may be served on attorney for	632
Arbitration by, sub. 4	451	Person of unsound mind for	36
Bond to be given by, before sale of property, sub. 1	498	Pleadings which need not be veri- fied by, sub. 2	116
if bond not given sale void, sub. 3,	498	Powers of to compel the production of testimony, sub. 3	38
purchase money to remain lien, until bond given, sub. 1	497	Prisoner for	36
guardian permitted to receive inter- est although bond not given,	497	Qualifications of	38
Costs, liability of, for, sub. 2	37	Report by what to state	36
when required to secure	619	when to be filed	36
Defense of infant to be made by	36	penalty for failing to file	36
must be made, or report filed, sub. 3,	36	Summons on for infant	62
failure to file or make report con- tempt, sub. 3	36	Witnesses summoned by	38
Depositions on interrogatories by consent of	572	Handwriting, disputed—	
Foreign, may sue in this State, sub. 4,	35	See ACT	604
Guardian <i>ad litem</i> appointed to act in place of, sub. 2	38	Heirs—	
Ky. Stat. applicable to	471	Actions against generally	26, 27
Notice to	627	against to settle decedent's estate, sub. 2,	428
when may be served on attorney for	632	by to settle decedent's estate, sub. 1,	428
Pleadings which need not be veri- fied by, sub. 2	116	Are real representatives, sub. 18	732
Settlement of accounts of in county court	472	Judgments, revivor of, by	402
May be recorded	472	revivor of, against	407
Venue of action by ward against	67	Revivor of actions against	506
		how made	506
Guardian ad litem—		must be within twelve months	508
Affidavit upon motion to appoint, <i>Form of</i> , page 627	38	in the name of	509, 511
Appointment of	38	Holiday—	
when there is a guardian, sub. 2	38	Bond given on, in action valid	664
affidavit to be filed, before, sub. 1,	38	Process may issue on	663, 664
summons to be executed on in- fant, before, sub. 1	38	may be executed on, when affida- vit made	663, 665
Change of, sub. 2	38	House—	
Clerk may appoint	38	Breaking of, by officer, to execute attachment	675
Defense or report must be filed by, sub. 3,	36	to execute order of arrest	676
failure to file, may be treated as contempt, sub. 3	36	Husband—	
judgment can not be rendered un- til made, sub. 3	36	See MARRIED WOMAN.	
		Action against by wife generally, sub. 1,	34
		for alimony or divorce	420
		by, against wife, sub. 1	34

Husband—Continued.

SECTION.

Defense for, when wife may make,	subs. 3, 4,	34
Divorce action by for		420
How made party in action against wife begun before marriage		84
May consent that depositions be taken upon interrogatories		572
Notice on, in action by or against wife		629
Testimony of, for or against wife, sub. 1,		606
Wife, when may bring action for, subs. 3, 4,		34

Idiots—

See PERSONS OF UNSOUND MIND.

Action by	35
Are embraced in term "persons of unsound mind," sub. 40	782
Defense for	36
Real property of, sale of	489
Summons on	52

Impeachment of witness—

By party producing him	596
adverse party	597

Imprisonment—

How evidence of persons confined may be taken	540
when evidence must be taken by deposition	540
In penitentiary, is disability, sub. 31, renders persons incompetent to testify, sub. 8	606
party can not testify against, sub. 8,	606

Inclosure—

When officer may break to execute attachment	675
to execute order of arrest	676

Incompetency—

See WITNESS.

Inconsistent pleading—

Forbidden, unless, sub. 4	118
-------------------------------------	-----

Incorporation—

Action to repeal articles of	480
--	-----

Incumbrances—

See LIEN.

Indemnifying bond—

See INDEMNITY.

(46)

Indemnity—

SECTION.

Action for, by surety before debt matures	287
after debt matures	661
attachment in, before debt matures, sub. 2	288
attachment in after debt matures, sub. 2	662
Bond of to defendant in action on lost writing	7
to owner of interest in joint property attached	208
to officer before levying attachment	211
before levying distress warrant, before levying execution	652
to officer upon taking property under order of delivery	191
Claimant must look to bond of	643
<i>Forms of bond of, pages 634, 640.</i>	

Index—

Of record books in justice's courts	715
judgments in judgment book	392
transcripts, sub. 12	787

Indivisible property—

Proceeding to sell real	694
personal	695

Indorsement—

See ASSIGNMENT.

To be made by sheriff upon process,	674
---	-----

• Infants—

Actions against for division of land, sub. 2,	499
by for division of land, sub. 2	499
against for sale of land	491
special provisions concerning	492
against guardian, venue of	67
against guardian may be brought by next friend, sub. 8	85
of, when to be brought by guardian	35
of, when to be brought by guardian for division of land, sub. 2,	499
of, when to be brought by next friend, sub. 8	85
Allegations against, when to be proved, sub. 1	126
of counter-claim or set-off to be proved, sub. 2	126
Appeal by, time in which to be taken	745
Bond to be executed to in sale of land, sub. 1	493
if not given, sale void, sub. 8	493
if not given, purchase price to remain lien, sub. 1	497

Infants—Continued.

SECTION.	
Bond, form of bond to be given by guardian, sub. 1	498
court must approve, sub. 2	498
<i>Certiorari</i> may be granted to, sub. 1	748
Defense of actions against, how made, sub. 3	86
no judgment against until defense made, sub. 3	86
to be made by guardian <i>ad litem</i> when	88
of action against on constructive service, sub. 5	59
no judgment against non-resident until defense made, sub. 7	59
Distinctions between plaintiffs and defendants	126
as to taking depositions upon interrogatories	574
as to granting new trials to	891
as to privileges in Court of Appeals, sub. 1	748
as to time in which to appeal	745
as to amendment of assignment of errors, sub. 2	756
as to verification of pleadings, sub. 2	116
Foreign, action by, sub. 4	85
Guardian of. See GUARDIAN.	
defense for by, sub. 3	86
action for by, sub. 1	85
when may bring action for in his own name	21
liability of for costs, sub. 2	87
when required to secure costs	619
Guardian <i>ad litem</i> . See GUARDIAN AD LITEM.	
defense for, by, sub. 3	86
appointment of, sub. 1	88
must be attorney, sub. 2	88
duty of, sub. 3	88
compensation of, sub. 4	88
Judgment against not allowed before defense or report, sub. 3	86
copy of not allowed to be served on	415
showing cause against after age	391
vacating, for errors not shown by proceedings, sub. 5	518
rendering before defense or report misprision, sub. 2	517
Married women who are. See MARRIED WOMEN.	
Next friend may bring action for, when, sub. 3	85
who may act as, and affidavit of, sub. 1	87
liability of for costs, sub. 2	87
when required to secure costs	619
New trial. See JUDGMENT <i>supra</i> .	
granted to	891, 518
Non-resident, action by, sub. 4	85

Infants—Continued.

SECTION.	
Notice to, how served	627
when may be served on attorney for	682
Summons against, how served	52
on custodian for	52
on guardian for	52
on father for	52
on mother for	52
on guardian <i>ad litem</i> for	52
actual, not allowed out of this State	56
Testimony of, when not admissible, party against, subs. 2, 7	606
Inferior courts—	
See COURTS.	
In forma pauperis—	
Guardian, committee, next friend, curator may sue in, sub. 2	87
Prepayments for depositions not required of persons suing in	583
Information—	
Denial of knowledge and, when sufficient, sub. 7	113
Of injunction, binding	283
by jury as to law or evidence after case submitted	321
as to situation of property ordered to be delivered	193
concerning attached property	220
from garnishees, by officer	206
from garnishees, by court	226
Injunction—	
Affidavit as to previous application for	273
to obtain issuance of without notice, may be read on application for	277
filing of	287
Application for, party who has answered to be notified	275
must be on notice in all cases, unless	276
for reinstatement of time to be granted, for	296
for reinstatement of, before whom and how made	297
Assessment of damages on dissolution of	295
Bond for, to stay proceedings on judgment, sub. 4	278
required before issuance of, generally	279
motion for additional security on	288
Form of, pages 686, 687.	
Cause for which, may be obtained	272
to stay proceedings upon judgment	17, 285
stay proceedings upon judgment	523

Injunction—Continued.

SECTION.

Cause for which may suspend pre- mature judgment	524
prevent action against decedent's estates	486
prevent action against trust es- tates	488
stay proceedings upon judgment in justices' court	284
stay waste in forcible entry and detrainer	467
prevent damage pending motion for mandamus	476
stay judgment to which set-off may be pleaded	878
Damages, assessment of by court upon dissolution	295
Decedent's estates, to prevent action against	486
Defined	271
Disobedience of, how punished . .	286
Dissolution of, motion for if granted without notice	289
by Court of Appeals	296, 747
motion for if granted by justice .	290
after answer filed	291
after answer filed, postponement of	292
after answer filed, decision upon	293
after answer filed, only one al- lowed	294
evidence on motion for, must be written	291
Evidence on motion to dissolve must be written	291
Execution, to stay when improperly revived	406
to stay proceedings on, generally,	278
Granting of, by whom allowed . .	278
Information of, binds party	283
Judgment of, for defense discovered after trial	17
to stay proceedings on, generally,	285
from justices' court	284
value of property in dispute must exceed \$25	284
granted only by court rendering judgment	285
when execution improperly re- vived	406
in action in which judgment if obtained could be used as set- off	878
by party seeking to vacate or modify	523
to stay proceedings on premature, pending trial of set-off	524
Justices, two may grant	689
Mandamus, to prevent damages pending motion for	476
Mandatory	271
Modification of	296, 747

Injunction—Continued.

SECTION.

Notice of application for	276
dispenses with service of order .	282
reasonable notice to be given . .	276
to defendant who has answered .	275
to dissolve or modify	290
to dissolve or modify upon whole case	291
See NOTICE.	
Order of, when and by whom granted	278
when and by whom issued	279
requisites and execution of . . .	281
granted before judgment, court to control	274
Form of, page 637.	
Reinstatement of, time to apply for,	296
by judge Court of Appeals	297
application for, how and before whom made	297
Set-off — injunction of judgment pending trial of	878
Temporary	276
Time of disposing of in inferior courts	721
reception of to be indorsed by officer	674
Trial of, in inferior court	721
Writ of, abolished	271

Injuries—

Character to, joinder of causes of action for, sub. 5	88
statement of extrinsic facts un- necessary in action for	128
Injunction may be obtained to re- strain. See INJUNCTION.	
Person and property to, joinder of causes of action for, sub. 6 . . .	83
Venue of action for, to person or character	74
of action for, generally	78

Injury to real property—

Venue of action for	62
-------------------------------	----

Inquest—

(See FORCIBLE ENTRY AND DE- TAINER.)	452
---	-----

Insane persons—

See PERSON OF UNSOUND MIND.	
-----------------------------	--

Insolvency—

Grounds for attachment	194
Oath of, may be taken by arrested debtor	168
how taken and proceedings upon,	168

	SECTION.		SECTION.
Instructions—		Interrogatories to parties—Continued.	
May be asked for by jury	321	<i>General provisions concerning—</i>	
Statement of in bill of exceptions, sub. 2,	337	Answers to must distinguish be- tween knowledge and belief	147
When to be given to jury, sub. 5	317	punishment for failing to answer	151
Written to be, if requested, sub. 5	317	verification of	148
		When to be taken as true on failure to answer	150
Instruments—		Interrogatories to witnesses—	
Of like character, how copied in bill of exceptions, sub. 8	335	See DEPOSITIONS.	
how copied in transcript, sub. 8	737		
Insurance companies—		Intervention—	
Venue of action against	71	By claimant of property in litigation	29
Interest—		Irrelevant matter—	
Abatement of in judgment before debt is due, sub. 8	247	To be stricken from pleading, with cost	121
Bonds of purchasers to bear	697	Irreparable injury—	
Common or general, one or more may sue or defend for all	25	May be prevented by injunction	272
Internal improvements—		Issue—	
Action to repeal charter of com- panies	482	Arises when	309
Interpleading—		Defined	309
Affidavit of party asking for	30	Equitable trial of	360, 361
Authorized	30, 31	Kinds of	309
By claimant	29	Material must be formed by plead- ings	114
Interrogatories to parties—		Of fact, arises how	310
<i>Circuit court—</i>		how to be tried	312, 313
In equitable actions	140	pleadings necessary to form al- lowed	89
answer, may be read by either party	140	law, how to be tried	312
not confined to response	141	Ordinary in, trial of	358, 359
shall be filed, when	142	Out of chancery trial of	11, 12
when to be filed to entitle party to trial	365	Transfer of to proper docket gen- erally	9
may be annexed to any pleading	140	of equitable to ordinary	10
party interrogating may testify as to new matter in	608	of ordinary to equity	10, 11
In ordinary actions, may be annexed to pleadings when	143	Jailer—	
answers to, when to be filed	144	Arrested debtor must be kept by	158
failure to file, effect of as to postponement	145	must give bond for release before, if in prison	163
not confined to response	146	Definition of word as used in Code, sub. 16,	732
party interrogating may testify orally as to new matter in	609	Liability of, as bail, and discharge	
Inferior courts—		of	174
May be filed against certain per- sons	716	as bail, how fixed	175
answers to, when to be filed	716, 717	of bail to, if bail adjudged insuf- ficient	176
on appeals from	718	Notice to, of motion on bail bond taken by him	165
		exonerated if motion is not made, or does not prevail	166
		Order of arrest, copy of, when to be delivered to	178

	SECTION.		SECTION.
Jailer—Continued		Joint property—Continued.	
Process to be directed to, when . . .	667	Levy of execution on	660
duties of as to execution and re-		appraisement of, sub. 1	660
turn of. See SHERIFF.		lien of creditor on, sub. 3	660
		when creditor may require forth-	
		coming bond, sub. 4	660
Joinder of actions—		Sale of, in action by joint owner,	
Causes of action generally	88	490, 496	
in pleadings, sub. 2	118	if share of each worth less than	
improperly joined may be stricken		\$100	490
out by court	85		
may be stricken out by party . . .	84	Joint stock company—	
may be stricken out, generally . .	871	Summons, service of on non-resi-	
Defense, of causes of, sub. 2 . . .	118	dent	51
Election between causes	85		
Parties plaintiffs having interest in		Joint tenants—	
action	22	See JOINT PROPERTY.	
united in interest must be	24	Defined, sub. 28	732
for sale of real property of infants,	489		
of joint interest	490	Judicial notice—	
of real estate generally	489-498	Facts showing need not be pleaded .	119
for division of land, sub. 2	499		
Parties defendant claiming interest,	23	Judges—	
united in interest	24	<i>Generally—</i>	
severally bound on contract . . .	26	Defined, sub. 12	732
jointly bound on contract	27	May be called as witnesses in actions	
Striking out cause improperly		before them	603
joined	84, 85	certify affidavits, sub. 1	549
Waiver of objection for misjoinder,	86	take depositions	562
		Court of Appeals—	
Joint debtors—		May allow petitions for rehearing	
Action against	27	and suspend mandate	760
by, for indemnity after debt ma-		reinstate attachments	270
tures	661	reinstate injunctions	297
after debt matures, provisional		dissolve or suspend injunction . .	747
remedies in	662		
before debt matures	287	Circuit courts—	
before debt matures, provisional		May appoint or change guardian <i>ad</i>	
remedies in	238	<i>litem</i> , sub. 2	88
Attachment against	209	receiver to sell attached prop-	
Defined, sub. 30	782	erty	218
General provisions as to	247, 248	receivers on motion	298
Joint property sold upon attach-		grant order of arrest in action for	
ment against one, when	209	debt not due	238
Judgment against one not bar		order of attachment in debt not	
against others	27	due	238
in action against	209	attachment for specific property,	
Property of one can not be attached		injunction	273
on grounds against another . . .	194	injunction to stay proceedings	
		under execution	406
Joint owners—		injunction to stay waste in forcible	
Sale of real property without con-		entry and detainer	467
sent	490	hear motion to dissolve or modify	
if share of each owner worth less		injunction	290, 291
than \$100	490	motion to discharge attachment,	
		motion to vacate order of arrest,	
Joint property—		order joint property levied on re-	
Attachment of interest in, bond to		taken by officer, sub. 4	660
be executed	208	order sale of attached perishable	
sale of under, when allowed . . .	209	property	218
Defined, sub. 29	782		

Judges—Continued.**Circuit courts—**

May permit committee, guardian, next friend to sue <i>in forma</i> <i>pauperis</i>	87
take depositions	562
take privy acknowledgment of an- swer of infant married woman, sub. 4,	498

Special judges, page 569.

County courts—

May act as clerk of quarterly court or empower county clerk to act	708
issue writ and try forcible entry and detainer	454
grant order of injunction	278
of attachment before debt due	238
of specific attachment	251
shall make settlement of trust es- tates	471

Special judges circuit court, p. 569.

Judgment—

Absent defendant against, sub. 7	59
Action to enforce collection of	489
venue of	70
Against part of defendants, 869, 870,	878
Assessment of damages before	879
Attachment sustaining, effect	261
discharging, effect	260
Award entered as, sub. 7	451
Before debt due	242
form of	243
Book of and index	892
Bonds that have force of	897
Collection of to enforce	489
Claimant's bond on	648
Collection of may be enjoined	878
Confession of practice, effect	381-388
Continuance as to some, judgment as to others	870
Contract, against parties bound on,	27, 181
Conveyance of property, sold under,	394
Co-obligor against principal	244
against co-obligor	244-247
Copy served on warning order de- fendant	415
manner of serving	416
effect	415
Co-surety against principal	244
Counter-claim on	887
Cross-index of	392
Damages for	389
Default in action at law	359
equitable action in	360
for part of claim	380
assessment of damages, before taking	379

SECTION.

Judgment—Continued.

SECTION.

Defendant constructively summoned against	409
bond to be executed before	410
Defendants against part of	870, 378
not actually summoned, sub. 7	59
Defined	368
Divorce case in, restoration of prop- erty	425
annulment of	426, 427
not set aside after term	344
Enforcement of	439
Entry of, on record	390
Equitable actions in	360
Error must be substantial to re- verse	184
Execution on	401
after death of plaintiff	402
Forcible entry and detainer, form of,	460
Index book of to be kept	392
Infant against	36
Injoining collection of	378
Injunction, pending proceedings to vacate	528
of generally	284, 285
Joint debtor against joint debtor,	245, 247
Lien created by, when	418
Lien to enforce	376
Lost writing on	7
Modification of	518, 518
Mortgage in action to enforce	374, 376
Motion, when obtained by	444
against what persons	444
client against attorney	444
surety against principal	444
written pleadings not required	449
how given	449
Non-resident against	59
Ordinary actions in	359
correction of	17
Parties for or against	369
Personal, when forbidden	419
Pleading of	122
Power of court over after term	518
Premature, correction of	516, 517, 519
suspended by injunction	524
Proof of facts before	379
Requisites of	390
Reversal of	513
Revivor of	407
Satisfaction of to enforce	489
of to be entered	398
Several defendants against	80
Set-off on	387
of judgments	377
Single defendant against	79
Summary proceedings in	449
motion for	444
Surety against principal	243
against co-surety	248
Tenant's bond, to discharge distress warrant	653
Transitory action in	78, 79, 80
Uncontested amount for	880

Judgment—Continued.	SECTION.
Vacation of, petition for	520
conditions on which vacated	521
of generally	518, 518
Verdict in conformity to	384
exception	384
against	386
court to direct form of on	385
generally	327, 328
Void, motion to correct before ap- peal	768
Judgment book—	
Duties of clerks concerning	392, 393
Satisfaction of judgments to be en- tered on	393
Judicial notice—	
Facts of which, taken not to be stated in pleading, sub. 1	119
Judicial sale—	
See SALES BY ORDER OF COURT.	
Jurisdiction of courts—	
<i>Court of Appeals</i> , page 547.	
<i>Circuit Court—</i>	
appellate, page 548.	
original, page 548.	
<i>County court</i> , page 549.	
<i>Fiscal court</i> , page 550.	
<i>Justice's courts</i> , page 550.	
<i>Police courts</i> , page 551.	
<i>Quarterly court—</i>	
appellate, page 549.	
original, page 549.	
Facts conferring, need not be stated in action on judgment	122
Objection to, by special demurrer, sub. 1,	92
by answer	118
failure to make is not waiver, sub. 4,	92
When one defendant, summoned in county	79-82
defendant summoned out of	78
Juror—	
May be called as witness	608
Jury—	
Admonition to, when permitted to separate	320
Assessment of amount of recovery by	329
Challenge of	316

Jury—Continued.	SECTION.
Conversing with others during trial forbidden	320
Damages assessed by, on dissolution of injunction	295
on failure to plead or after de- cision of issue of law	379
excessive allowed by, cause for new trial	340
for detention of specific property, to be assessed by	330
smallness of, assessed by in action for tort, not cause for new trial	341
Discharge of, causes for which allowed	322
without verdict, time of retrial to be fixed by court	323
Duty of, after case is submitted	319
Formation of, not changed by Code,	316
Forming opinion by before submis- sion, forbidden	320
Information may be asked by	321
Issue of fact may be tried by	313
in action for injury to person or character	312
Kept together, to be	319
Misconduct of, cause for new trial	340
Officer in charge of	319
Place, view of by	318
Placed in charge of officer, when	319
Polling of	324
Real property view of by	318
Rendition of verdict by	324
how done	325
Separation of	319, 320
Swearing of commencement of trial,	590
Trial by, may be waived	381
in certain actions must be de- manded	312
right to, authorizes transfer of action	10
parties not entitled to in inferior court, unless	713
Value jury to assess	330
Verdict, announcement of	324
rendition of	325
assessment of amount of recovery in, when necessary	329
assessment of damages and value in action for property	330
may be general, separate general	326
Inconsistent, judgment to pursue separate-general	327
judgment notwithstanding	336
not sustained by evidence cause for new trial	340
foreman to sign	325
clerk to read	325
defined and described	326, 327
written to be	325
polling of jury	324

Justice of the peace—

See COURTS.	
Affidavit, taking of by	549
certifying of, by	551
Arbitration of controversies before,	
sub. 9,	451
Bonds, return of before	651
return before of bond to discharge	
distress warrant	653
motion on	654
trial of motion on	655
Clerks of their own courts	702
the word "clerk" embraces,	
sub. 39,	782
Courts of. See COURTS.	
Defined, sub. 16	782
Depositions may be taken by	562
Executions, provisions concerning	
the issue of by	651
land can not be sold under, issued	
by	122
Forcible entry and detainer, trial of	
by	454
Injunction may be granted by two,	
of judgments of for less than	
\$25 forbidden	284
Powers, as to writs of forcible entry,	454
Process, appointment by, of agent	
to serve	701
Provisional remedies may be granted	
by two	689

Kentucky Statutes—

Provisions adopted concerning pro-	
bate of wills	470
civil proceedings in behalf of	
Commonwealth	450
property conveyed in trust	438
settlement of accounts of fidu-	
ciaries	471
settlement of decedents' estates	437
exemption from execution	200

Knowledge—

Denial of, and information when	
sufficient, sub. 7	118

Land—

Action for, description of in	125
joinder of causes of, sub. 2	88
venue of	62
answer of defendant, what to	
state	125
Burden of proof in action to recover,	
Conveyance of by commissioner.	
(See COMMISSIONER.)	394
Costs in action to recover	125
Division of. (See DIVISION OF LANDS)	
Dower, allotment of	499
Idiot, sale of	489
Infants, sale of	489
Joinder of actions concerning!	88

SECTION.**Land—Continued.****SECTION.**

Joint owner, sale of	490
Jurisdiction of equity over, sub. 16,	
actions concerning	62
for recovery of	62
partition of	62
sale of	62
lien on to enforce	62
injury to	62
Lunatics, sale of	489
Married woman's, sale of	498
Person of unsound mind, sale of	489
Partition of	499
Petition in action to recover	125
in action to subject	125
Sale of under execution from in-	
ferior court forbidden	722
under judgment of inferior court	723
for debt	694
terms of and how made	696
bonds executed and lien re-	
tained	697, 699
persons under disability	489
Landlord—	
(See FORCIBLE ENTRY AND DE-	
TAINER)	452
Action against by tenant for wrong-	
ful distraint	38
Attachment by, for rent	195
form of affidavit and bond, pages	
685, 686.	
Distress warrant	652
form of and bond under, page 642.	
bond of tenant to discharge	653, 658
appraisal before taking	653
motion for judgment on	654
defenses allowed to	654
trial of	655, 656
judgment on	657

Law—

Issues of to be tried by court	312
Presumptions of, not to be stated in	
pleading	119
Stated separately from facts	332

Lawyer—

See ATTORNEY.

Leading question—

When allowed, in examination	595
--	-----

Leaving county of residence—

Authorizes attachment, when,	
sub. 4,	194
By party, after commencement of	
action, effect of summons else-	
where	82
To defend action, party can not be	
summoned by plaintiff	81

	SECTION.		SECTION.
Leaving county of residence—Continued.		Lien—Continued.	
Witness leaving county of residence to obey subpoena can not be sued	542	Release of	699
		Retained on property sold	699
Legatee and distributee—		Sales for satisfaction of	694
Action by or against, to settle de- cedent's estate	428	Supplemental pleading in action to enforce	185
for distribution, partition, or sale of	66	Venue of action to enforce	62
Liable to action to extent of estate received	484	When debts are owned by different persons, sub. 8	694
Refunding bond may be required of,	485	Life estate—	
Venue of action to settle decedents' estate	65	Action for sale of reversion or re- mainder	491
Levy—		Life tenant—	
See ATTACHMENT, EXECUTION, DISTRESS WARRANT.		Partition of lands by	499
Liability and discharge of bail—		Limitation—	
(See ARREST AND BAIL)	180	Action by creditor against legatee or distributee	484
Libel and slander—		Appeals from inferior courts	729
Defendant may plead truth and mitigating circumstances	124	to Court of Appeals	745
Intrinsic facts need not be stated	128	Application for new trial	342
Joinder of actions for	88	for ground discovered after judg- ment	844
Smallness of damages, not ground for new trial	841	by infant	891
Venue of action for	74	by defendant constructively sum- moned	414, 415
Lien—		Inquisitions of forcible entry and detainer	469
Action to enforce	692, 694	Issual of execution	401
Attachment allowed in action to enforce	249	Revivor of actions	508
Created on defendant's property in action to enforce judgment	442	Lis pendens—	
on property of defendant con- structively summoned	418	Debts maturing during action	185
by attachment	212	for sale of real estate, sub. 8	694
by execution on interest in joint property	660	Ground for special demurrer	92
Cross-petition in action to enforce	692	May be relied on in answer, when	118
Defendant constructively sum- moned on, property of	418	Waiver of objection concerning, 92, 118	
Enforcement of, for debts maturing <i>pendente lite</i>	185	Litigation—	
for debts due defendant	692	Claimant of property in, may inter- vene	29
judgment may be without time to pay money	374	may be interpleaded	80, 81
in action for, personal judgment may be rendered	376	may be substituted for officer sued	81, 82
Execution on interest in joint prop- erty, of	660	Deposit in court of subject by gar- nishee	320
Preservation of, to modified judg- ment	521	by garnishee	225
Real property sold under judgment,	699	by party	308
Receiver in action to enforce	298	Loan—	
in action to enforce mortgage	299	Of money by court	308
		Local action—	
		See VENUE OF ACTIONS.	
		Lost baggage—	
		Testimony of husband and wife concerning, sub. 1	606

	SECTION.		SECTION.
Lost judgments—		Marriage—	
Action on	7	Of female party, husband may be	
Renewal of in inferior court	719	joined with her, sub. 5	84
Lost writing—		Married woman—	
Action on, may be ordinary or equi-		See HUSBAND.	
table	7	Action by and against	84
Form of bond to be given by plaint-		when she may sue and be sued	
iff, page 625.		alone	84
Lunatics—		husband must be joined with her	
See PERSONS OF UNSOUND MIND.		generally	84
Action by	85	against her and husband, she may	
against	86	defend for him	84
Evidence against	606	by or against husband, when she	
New trial to	518	may sue or defend for him	84
Notice how served on	627	when she marries pending, hus-	
Premature judgment against, cor-		band made party	84
rected	517	for division of land and allot-	
Real property of sale of	489	ment of dower	499
Sale of wife's inchoate right of		Depositions for or against, when	
dower	496	may be taken on interroga-	
Summons, how served on	53	tories	572
Venue of action against	69	Disability removed, as to actions by,	
Maintenance—		as to actions against	86
Wife pending action for divorce . .	424	non-resident	59
Majority—		verifications of pleadings, sub. 8,	
Of persons authorized, may act . .	679	traversing allegations of plead-	
Mandamus—		ings, subs. 1, 2	126
Court to decide all questions in, or-		showing cause against judgment,	
ders to be final	475	non-resident	415
may make preventive orders in . .	476	premature judgment against,	
Judgment affecting Commonwealth,		sub. 2,	517
appeal	478	taking depositions on interroga-	
Mandamus defined	477	tories	574
Motion for	474	testimony of party against,	
notice of	474	sub. 7,	606
court to decide questions on . . .	475	service of notice on	627
granting is final order	475	<i>certiorari</i> , sub. 1	743
refusing is final order	476	time to appeal to Court of Ap-	
Petition for	474	peals	745
Temporary order of	476	transcript of record for Court of	
Writs of, how obtained and prose-		Appeals, sub. 5	737
cuted	474	service of summons on out of	
how enforced	475	State	56
Mandates of Court of Appeals—		Division of land or allotment of	
Enforcement of, by Court of Ap-		dower to, sub. 2	499
peals	762	Dower contingent, right of may be	
Proceedings on, in courts below . .	761	sold	495
When to issue, sub. 1	760	Evidence of, when competent for	
Mark—		husband, sub. 1	606
Of person who can not write, suffi-		Infant, sale of land of, for invest-	
cient signature, sub. 7	782	ment, sub. 5	489
to be attested by a witness, sub. 7,	782	bond to be executed by husband,	
		sub. 1,	498
		court to indorse its approval on	
		bond, sub. 2	498
		sale void if bond not given, sub. 3,	
		sale of land for investment, she	
		must answer on privy exami-	
		nation	498
		proceeds of sale of land of, how to	
		be invested, sub. 4	494

	SECTION.		SECTION.
Married woman—Continued.		Measure of damages—	
Infant, how proceeds to pass on her death, sub. 6	494	See DAMAGES.	
when proceeds to be paid to her, sub. 2,	497	Mesne profits—	
proceeds to be separate estate, sub. 8,	497	Action for, not barred by proceedings in forcible entry and detainer	468
interest on proceeds may be paid to her, sub. 4	497	Minister—	
bond nor examination not required when, sub. 1	496	Not to testify concerning confession made to him, sub. 5	606
Lunatic, sale of inchoate right of dower of (see reference to)	496	Ministerial officer—	
May not act as next friend, sub. 1	37	May act by lawful deputy	678
Notice to, when may be served on husband	629	take affidavit of bail	164
Of unsound mind, how summons served on	58	take affidavit of surety	683
Real property of, sale of	498	Minor—	
Summons may be served on, out of State	56	See INFANT.	
on for husband, when	58	Miscellaneous proceedings—	
Wife of lunatic must be defendant to action to sell his land, sub. 3,	492	Authorized by Code	616, 662
when summons against husband to be served on	58	Miscellaneous provisions of Code .	678, 699
Marshal—		Misconduct—	
City, process from inferior court may be directed to	701	Of jury, prevailing party, or attorney, ground for new trial, sub. 2,	340
Masculine gender—		Misfortune—	
Defined, sub. 8	782	Unavoidable, ground for new trial, sub. 7,	518
Master commissioner—		Misjoinder—	
See COMMISSIONER.		Of causes of action, correction of	85
May take affidavit, sub. 1	549	Waiver of objection for	86
Material allegation—		Misnomer—	
Defined	127	Correction of	184
When taken as true unless traversed,	126	Misprision—	
Material issue—		See CLERICAL MISPRISION.	
Must be formed by pleadings	114	Mistakes—	
Material variance—		In pleading—See AMENDMENT.	
Amendments to cure	129	Mitigating circumstances—	
Defined	129	And truth may be pleaded in libel or slander	124
What is not, amendment to	131	Modification—	
Matter—		Of injunction—See INJUNCTION.	
Irrelevant or redundant, to be stricken from pleadings	121	Of judgment—See JUDGMENT.	
Maturity—			
Arrest or attachment for debt before	238		

	SECTION.		SECTION
Money—		Motions—Continued.	
Action for, includes action for damages, sub. 8	782	Injunction to dissolve or modify	289
Attachment of, in court	207	after answer filed	291
Deposit of, by defendant in lieu of bail	159	on the whole case	292
in court by trustee or party may be required	308	how and before whom made	290
in bank by court	307	only one allowed on whole case	294
Enforcement of surrender of, in action to enforce judgment	448	for additional surety on bond	288
Garnishee may pay to sheriff or into court	228	Judgments which may be obtained by. (See SUMMARY PROCEEDINGS)	444
May be confided by court to sheriff, lent by court on consent	306	to set-off in same court	377
	308	to affirm as delay case	759
		Mandamus for writ of	474
		New trial, for	340
		Notice of	445
		Officer against surety for costs	444
		Party against surety for costs	444
		Pleadings not required	449
		Prohibition, writ of to obtain	474
		Summary proceedings by. (See SUMMARY PROCEEDINGS)	444
		Surety against principal	444
		for additional on bail bond	165
		Transfer of action and issues. See TRANSFER.	
		Vacate order of arrest or reduce bail, 177	
		Multiplication of actions—	
		Costs unnecessary plaintiff to pay	687
		Municipal corporation—	
		Service of summons against, sub. 2, 51	
		Master—	
		Service of process on person attending	666
		Mutilated—	
		Action on writing, bond, judgment or record, that is	7
		Name of parties—	
		Action for discovery of	685
		Correction of mistake concerning	184
		Ne exeat—	
		Writ of abolished	688
		Negotiable paper—	
		Action on parties to	26
		Provision as to assignment of chose in action does not apply to	19
		New matter—	
		Party may testify as to if stated in answers to interrogatories, 608, 609	
		New parties—	
		Court may require to be made	28

SECTION.	
New trial—	
Absent defendant, time to apply for	414
Accident, grounds for	340
After term	518
Application for by motion	348
when to be made	342
by petition	344
by defendant constructively sum- moned	414, 415
Casualty, ground for	518
Clerical misprision, cause for	517, 519
Defendant, constructively sum- moned, time to apply for	414
Definition of	340
Divorce case, not allowed when granted	344
Error of law on trial, ground for	340
in assessment of recovery	340
Excessive damages, ground for	340
Fraud of successful party, ground for	518
Grounds for	340
after term has expired	344, 518
Infants, time to apply for	391
provision as to	391
application for by	518
Injunction by party seeking	520
irregularity on trial	348
Judgments, vacation of generally	518
when not vacated	17
Justices' courts in	714
Misconduct of court, jury, party	340
Misfortune, cause for	517, 519
Misprision, cause for	518
Motion and grounds for	348
affidavits to support and contro- vert	348
Newly discovered evidence	340
Not more than two granted	341
Quarterly court in	714
Smallness of damage not cause for	341
Title to property, how affected by	417
Verdict against evidence	340
against law	340

Next friend—	
Actions that may be brought by	35, 84
Affidavit of, for warning order	58
showing right to sue	37
Costs of action, liability of for, sub. 2	87
when required to give security for	619
Persons who may sue by	35, 84
who may sue as, sub. 1	37
Qualifications of, and affidavit con- cerning, sub. 1	37
Service of notice on	627
on attorney for	632
Verification of pleadings by, sub. 8,	117
Wife, when may sue by, sub. 6	34

SECTION.	
Non compos mentis—	
See PERSON OF UNSOUND MIND.	
Non-residents—	
Attachment against	194
Association, summons on	51
Bond for costs required of before commencing action	616
upon intervening in action	29
effect, if not given	617
required of plaintiff becoming non-resident	618
surety in becoming non-resident, new bond may be required	620
until given, attorney liable for costs	621
Individual summons on	51
Infant, action by, sub. 4	35
Joint stock company, summons on	51
Partnership, summons on	51
Warning order against	57
No property found—	
(See ENFORCING SATISFACTION OF JUDGMENT)	
On execution from inferior courts, proceedings on	439 728
Return of, as to person arrested, necessary to fix liability of bail	171
Notary public—	
Affidavits may be taken before, sub. 1,	549
Depositions may be taken before	562
Note—	
See PROMISSORY NOTE.	
Not found—	
Return of, necessary to fix liability of bail	171
Notice—	
Agents, to	625
of corporation to	428
Amendment of, before answer	182
Arrest of motion to vacate	177
Attachment, to discharge in vaca- tion, sub. 1	268
to sell perishable property taken under	218
of motion for transfer of, to one court, sub. 8	210
of officer who requires indemnify- ing bond to plaintiff before levying	211
to plaintiff in, that additional se- curity is required on bond	236
of motion to discharge	265

	SECTION.		SECTION.
Notice—Continued.		Notice—Continued.	
Attorney, to	625	Court may direct mode of service	628
for corporation	628	mode of	625
generally	631	on parties who are numerous, or whose residence is not known,	626
to take depositions	632	on persons under disability	627
for non-resident	630	on corporations	628
Bail, of objection to insufficiency of,	165	on husband and wife	629
Corporations, to	628	on persons constructively sum- moned	630
Creditors, to, in action to settle de- cedents' estate	480, 481	Summary proceedings in, generally,	446
in action to settle trust estates	438	Surety, against principal or co- surety for judgment	444
Contents of, generally	624	Wife, how served on	629
Defendant constructively summoned in	630		
Depositions, to take	566	Number—	
what is reasonable	567	Defined, sub. 4	782
on interrogatories	571		
at adjourned time or place	568, 569	Numerous parties—	
when may be served on attorney,	632	Court may require depositions against to be taken on inter- rogatories	573
against non-resident	630	Notice to may be served on part of,	626
against infant or person under dis- ability	627	When part may sue or defend for all,	25
in action by or against husband and wife	629		
Forcible entry and detainer, to de- fendants in	455	Oath—	
Husband to, for wife	629	Affirmation may be substituted for,	680
Infants, service on	627	included by word, sub. 23	782
Injunction, to dissolve	289	Insolvency of, may be taken by ar- rested debtor	158, 168
of application for	275, 276	May be administered by arbitrator, sub. 6,	451
for additional security on bond	288	clerk of court	671
Insolvency of, taking oath of	168	judges, justice of the peace	549
Interrogatories, of filing	142, 144	notary, public examiner	549
Judgment, to correct	519	ministerial officers to bail or surety	164, 683
of motion to set-off	377		
for, on bond to suspend execution sale	648	Objection to decision—	
for, on bond to suspend distress warrant	654	How taken	333
Lunatic, service on	627	When to be taken	334
Mandamus, of application for writ of	474		
Offer to compromise, acceptance of,	634	Offer to compromise—	
Officers who may execute	624	Effect of acceptance or refusal of	634, 635
Penalty for failure	688	Not cause for postponement	636
Non-resident to, to be served on at- torney for	630		
Persons, who may execute	624	Offer to confess judgment—	
Pleadings, of filing in equitable ac- tion	106	Effect of	640
of filing in vacation generally,	108, 109		
of filing amendment	132	Office—	
Prohibition, of application for writ of	478	Usurpation of (See REPEALING OR VACATING CHARTERS)	480
Receiver, of application for to take charge of attached property,	218		
Requisites of	624	Officer—	
Return to be indorsed on	624	Bailiff may be appointed by	47
Sale of, by order of court generally	696	Deputy, may act for	673
Service of, by whom made gen- erally	624	Duty of, as to property attached in his possession	204

	SECTION.		SECTION.
Officer—Continued.		Orders—Continued.	
Evidence of, how taken	544	Final, concerning appointment of receiver	298
Judgment or determination of how pleaded	122	concerning attachments	266, 267
judgment on motion of	444	concerning mandamus and prohibition	475
May appoint person to serve summons	47	For provisional remedy, when inferior court to dispose of	721
surrender property levied on in action by claimant	80, 81	delivery of personal property	181
have plaintiff in writ substituted as defendant	32	breaking building and doors to execute	675
Ministerial, may act by deputy	678	Of reference by clerk during vacation	481
may administer oath to bail or surety	164, 683	survey, by clerk, in vacation	671
Oath, may be administered to surety to bail	164	To prevent damage, pending motion for mandamus or prohibition	476
Person may be appointed by to execute summons	47	Warning. (See WARNING ORDER)	58
Return of, on summons how amended	49	Order of attachment—	
Substitution of claimant for	31, 32	See ATTACHMENT	199
Venue of action against	68	Order of court—	
Who may execute process	667	Defined	622
summons	47	Order of delivery—	
Off-set—		(See CLAIM AND DELIVERY)	180
See SET-OFF.		Order of survey—	
Onus probandi—		Clerk may make in vacation	671
See BURDEN OF PROOF.		Order of trial—	
Opinions—		See TRIAL.	
Of Court of Appeals to be in writing	765	Ordinary action—	
Oral examination—		Action, when to be	5, 6
See EXAMINATION.		Answer in, time of filing	102, 108
Of witness defined	546	Dismissal of, as to defendants not summoned, to obtain trial	363
Oral testimony—		Distinction between ordinary and equitable	6
In equitable actions, generally	552	Division of land, or allotment of dower, for, sub. 10	499
in justices' and quarterly courts,	708	Docket of	348
Of defendant as to attached property may be required	220, 257	how kept	349
garnishee or officer holding property may be required	229	when to be called	358, 359
person confined in jail	540	Equitable defense to, must be pleaded	17, 113
other persons when required	556	Error as to form, does not abate	8
On motion to discharge attachment, petition for new trial	264, 844	how corrected	10
Order book—		waiver of	16
Entry of judgments on	390	Exhibits in, how made part of record	128
Orders—		on which action is founded, must be filed or accounted for	120
Common, action on	26	Interrogatories in (See INTERROGATORIES)	143
Defined	622	Issue of law, may be heard on first call of docket	359

	SECTION.		SECTION.
Ordinary action—Continued.		Parties—Continued.	
Judgment in can not be annulled or modified in equity, except . . .	17	Numerous, action by or against part for all	25
does not bar set-off or counter-claim	17	notice to part for all by order of court	626
on failure to defend	359	court may require depositions taken on interrogatories . . .	573
Lost writing, on	7	Persons in interest to be joined . .	24
Pleadings in, time of filing . . .	102, 103	Real in interest, must bring action generally	18
Transfer of	8, 10, 11	Substitution of	20
Trial of	358, 359	Testimony of, when allowed for themselves	605, 606
when stand for	363	when required against themselves, sub. 10,	606
Usurpation of office, to prevent . .	480		
Vacate charters, to	480	Partition—	
Venue of. See VENUE OF ACTIONS.		Joinder of causes of action for, sub. 4,	83
Ordinary docket—		Jurisdiction of equity concerning, not affected, sub. 16	499
Arrangement of	849	See amendment to	499
Attorneys' names to show	358	Venue of action for	66
Calling of	358, 359		
Entries on	348, 354	Partnership—	
Parties, names to show	358	Summons against non-resident . .	51
Other country—		Partnership property—	
Defined, sub. 21	732	See JOINT PROPERTY.	
Papers—		Levy of attachment on	208, 209
Filing, time to be indorsed by clerk, with pleadings, when necessary . .	669	Party—	
with pleadings, when permitted . .	120	Means who? sub. 35	732
Genuineness of, when regarded as admitted	527	Party in interest—	
Lost, action on	7	Action to be in name of	18
Original, to be transmitted from inferior courts on appeal	725	Pauper—	
on traverse of forcible entry and detainer	463	Action by without securing costs . .	37
transmission of to Court of Appeals, sub. 2	748	Not required to pay for depositions, . .	583
Paragraphs—		Payment—	
Pleadings to be separate, numbered, when, sub. 3	113	Of money by garnishee, into court or to sheriff	223
Partial defense—		Penalty—	
Allowed, sub. 2	113	Venue of action for, sub. 1	63
Parties—		Officer for contempt	204, 633
Action for discovery of name of . .	685	Witness against	535, 536
Assignee may sue	19	Pendency of action—	
Claimant of property to be	29, 30	See LIS PENDENS.	
Creditors, by filing claims become .	482	Penitentiary—	
Defined, sub. 81	732	Testimony of officers by deposition, to be in person, when	554
Having common interest, how to sue or defend	25	of convicts in, not competent, sub. 8	606
Interested persons to be	22, 23, 24		
Judgment, in ordinary action against one or more of several, generally	363, 369, 370		
against one or more	373		
New parties, court may require . .	28		

	SECTION.		SECTION.
Perishable property—		Person of unsound mind—Continued.	
Sale of when attached	218	Bond must be approved by the judge, sub. 2	498
Perpetuating testimony—		<i>Certiorari</i> , may be granted to, sub. 1,	748
Provision as to	610-615	Committee of, action by in his own name	21
Person—		action by generally	85
Corporation included by word, sub. 5,	782	action against, by next friend	85
Defined, sub. 5	782	liability of, for costs	87
Joinder of causes of action for injury to, sub. 6	88	when required to secure costs	619
Venue of action for injury to	74	Defense of action against, by whom to be made	86
Personal judgment—		by guardian <i>ad litem</i>	88
May be rendered in action to enforce lien	376	in action to divide land of, sub. 2,	499
Not allowed against defendant constructively summoned	419	Depositions against, how taken	574
Personal property—		Distinction between plaintiff and defendant as to verification, sub. 2,	116
See PROPERTY.		as to taken depositions against	574
Claim and delivery of—(See CLAIM AND DELIVERY)	180	as to proceedings in Court of Appeals	748
Personal representative—		as to time in which to appeal	745
See REPRESENTATIVE.		Includes what persons, sub. 40	782
Meaning of word, sub. 17	782	Judgment against, not to be rendered until defense or report filed	86
Person of unsound mind—		Next friend of, action by	85
Action against, how defended generally	86	Non-resident, action of, by whom brought	85
for division of land, how defended, sub. 2,	499	Notice to, how served	627
for sale of land	489	Pleadings of, verification when not necessary, sub. 2	116
for sale of land owned jointly	490	by whom to be made, when required, sub. 3	117
for sale of land and investment of the proceeds	491	Summons against, how served	58
for sale of land, special provisions concerning	492	not allowed to be served out of this State	56
bond to be given by committee, sub. 1,	498	Testimony of parties against, subs. 2, 6,	606
if bond not given, sale void, sub. 8,	498	as to entries in book, sub. 7	606
general provisions concerning, 494-498	494-498	Vacation of judgment against, sub. 5,	518
venue of, if in asylum	69	Venue of action against, if in asylum	69
Action of, by committee in his own name	21	Words include person destitute of mind, sub. 40	782
by whom to be brought generally, sub. 1,	35	Persons under disability—	
may be brought by next friend, when, sub. 3	35	See INFANTS, MARRIED WOMEN, PERSONS OF UNSOUND MIND, PRISONERS.	
non-resident, who may bring, sub. 4,	35	Petition—	
Allegations against, when to be proved though not traversed,	126	Alternative allegations in, when allowed, sub. 4	118
Bond, by committee in action to sell land	498	Amendment of, generally	184
if not given sale void, sub. 3	498	before answer	182
		notice of filing, when necessary	182
		after demurrer filed in vacation, sub. 2,	109
		after demurrer sustained	94
		costs of	94, 113

	SECTION.		SECTION.
Petition—Continued.		Physician—	
Amendment of, verification of . . .	189	Certificate of to prevent service of	
continuance on, when allowed . .	186	summons on lunatic	53
to cure variance	129, 180	Evidence of, how taken	554
Answer, embracing set-off or coun-		Personal attendance of as witness,	
ter-claim is sub. 86,	782	when required	556
Caption of, requisites of	110		
Causes of action which may be		Place of sale—	
stated in, sub. 2	118	Of property under decree	696
must be paragraphed when,			
sub. 8,	118	Plaintiff—	
Claimant by, to be made party . .	29	Means who? sub. 86	732
Commencement of action, filing		Must briefly state his case to jury	
and issuing summons is	89	after they are sworn, sub. 1 . .	317
Delivery of copy of, and summons		Who may join as 22,	24
to defendant out of State, ef-		When word embraces defendants,	
fect	56	sub. 86,	732
does not authorize personal judg-			
ment	419	Pleading and proof—	
Divorce, for annulment of judg-		Material variance between, effect .	129
ment of	426	immaterial, effect	130
Discovery for, of name and resi-			
dence of party	685	Pleadings—	
Embraces what? sub. 86	782	Allegations of, affirmative, only to	
Facts constituting cause of action		be answered	112
must be stated in	90	alternative allowed, but inconsis-	
Filing of, by persons intervening in		tent forbidden	113
action	29	what are material	127
of generally	89	when to be taken as true against	
<i>Forms of, pages 596, 616.</i>		absent defendant	409
Interrogatories may be annexed to,		when to be taken as true, gen-	
when 140,	148	erally	126
Judgment, for vacation or modifica-		Allowed by Code	89
tion of	520	Alternative, when allowed, sub. 4,	113
Land, for division of or allotment		Amendment of, after demurrer sus-	
of dower, sub. 1	499	tained	94
Libel in action for	123	name added by	134
New trial, for	344	mistake cured by	134
Paragraphing of, sub. 8	118	defect, to correct	134
Perpetuation of testimony, for . .	610	variance to cure 130,	131
Prayer of	90	generally	134
alone granted, if no defense made,		to cure error as to form of action,	
Requisites of	90	costs of, after demurrer sustained,	
Slander in action for	123	costs of, generally, sub. 5	113
Striking out cause of action . . 84,	85	cause for continuance, when . .	136
Summons on	39	petition before answer	132
Supplemental, when allowed . . .	185	verification of	139
Verification of, generally	116	Attachments, affidavits of parties	
by whom to be made	117	constitute	268
may be made on or before calling		Caption of, generally, sub. 1 . . .	110
action for trial	187	answer, when to mention set-off	
amendments to	139	or counter-claim, sub. 4	97
unnecessary in action for division		reply, when to mention counter-	
of land or allotment of dower,		claim, sub. 4	97
sub. 14,	499	Causes of action that may be stated	
in action for divorce or alimony,		in, sub. 2	113
in action to enforce satisfaction		Claimant, petition by to be made	
of judgment	441	party	29
Warning order on	89	Costs of defective, who to pay . .	113
Writings, which may be filed with .	128	Counter-claim, sub. 1	96,
which must be filed with	120	Cross-petition, sub. 8	111
genuineness of, when admitted .	527		

Pleadings—Continued.

SECTION.

Defenses that may be stated in, sub. 2	118
Defined	87
Demurrers	91
Denial of knowledge, or information,	118
Departure in, forbidden	101
Description of land in, sub. 1	125
Dismissal of action	118, 871
Evidence not to be stated in, sub. 1,	119
Exhibits in	128
Extrinsic facts need not be stated in action for slander or libel	128
Filing of, after demurrer overruled, in clerk's office, generally	108, 109
time of. See TIME OF PLEADING.	
Form and sufficiency of	88
Forms of, generally, pages 596, 624.	
Inconsistent statements in	118
Interrogatories annexed to	140, 148
Irrelevant and redundant matter in	121
Issue must be formed by	114
Judgment, how pleaded	122
Land in action, to recover	125
Language of, to be English	115
Libel in action for	123, 124
Lien to enforce	692, 694
Oral, when allowed	705
Paragraphing of, sub. 8	118
Presumptions of law need not be stated in, sub. 1	119
Private statute, how stated in, sub. 2,	119
Rebutter, when allowed, sub. 1	89
Reformation of	114
Slander in action for	123, 124
Statute, how pleaded	119
Reply and additional pleadings, when not allowed	112
Set-off, sub. 2	96, 111
Sham, forbidden, sub. 8	118
Striking out part of	84, 85, 118
Supplemental	185
Surrebutter, when allowed	89
Surrejoinder	101
Traverse, what is	118
Variance, between proof and failure of proof is not variance	129, 181
Verification of	116
by whom made	117
Forms of, page 627.	
Written to be	115
Writings, required to be filed with, allowed to be filed with	120, 128

Pleas to appeals 758

Plural—

Defined, sub. 4	782
---------------------------	-----

Police courts—

SECTION.

See COURTS.	
Jurisdiction of, page 551.	

Polling of jury—

On return of verdict	824
--------------------------------	-----

Possession of personal property—

See PROPERTY.

Postage—

Prepayment of, to examining officer, to clerk, before returning depositions to officer	588, 588
--	----------

Postmaster—

Evidence of to be taken by deposition	554
Personal presence of, as witness, how secured	556

Postponement of trial—

Affidavit for, on account of absence of evidence	816
Amendment of pleadings, when cause for	186
to cure immaterial variance, not cause for	180
As to parties not summoned in actions on contract	868
For failure to answer interrogatories in equitable action	142
in ordinary action	145
Offer to compromise, not cause for	686
Of motion to dissolve or modify injunction	292
trial of attachment	259

Power—

Majority of persons authorized, may exercise	679
--	-----

Prayer for relief—

Petition in	90
Pleadings in	97

Precedence of attachments—

According to time of delivery to sheriff	202
On fund in court	207
Reference to commissioner to ascertain	285

Prejudice to future action—

Dismissal for want of proper parties, when dismissal may be without	28, 871
---	---------

	SECTION.		SECTION
Preliminary provisions—		Private corporations—	
Of Code	1, 2, 8	See CORPORATIONS.	
Premature judgment—		Private statute—	
Correction of, may be by motion		Manner of pleading, sub. 2	119
after notice	519	Must be pleaded, sub. 1	119
and then by appeal	516		
Injunction against	524	Privies—	
Rendering is clerical misprision,		Appeals by and against	784
subs. 1, 2,	517		
Presumptions of law—		Privileged communications—	
Statement of in pleadings forbid-		What are, subs. 1, 5	606
den, sub. 1	119		
Priest—		Probate of will—	
Not to testify concerning confes-		Provisions of Ky. Stat. to, as adopt-	
sion, sub. 5	606	ed	470
Principal—		Venue of actions or proceedings	
See AGENT, ATTORNEY, SURETY.		concerning	64
Printing—		Proceedings—	
Included by word "writing," sub. 6, .	782	Amendments of generally	184
Priority of attachments—		In court below upon return of case, .	761
See PRECEDENCE OF ATTACH-		Special, defined	3
MENTS.		embraced by word "action,"	
		sub. 84,	782
Prisoners—		To reverse, vacate or modify judg-	
Actions against, defense of, sub. 2 .	86	ments	513-524
Actions in favor of, sub. 2	85		
by next friend, sub. 1	87	Process—	
liability of next friend for costs,		See SUMMONS, SUBPOENA.	
sub. 2,	87	Court may appoint person to exe-	
may be required to secure costs .	619	cute	668, 701
Allegations against must be proved,		Defined, sub. 26	782
subs. 1, 2,	126	Direction of, generally	667
Appeal by, one year after disability		of summons	40
removed	745	from inferior courts	701
<i>Certiorari</i> may be granted to, sub. 1, .	743	Doors may be broken to execute . .	675
Confined in penitentiary, are persons		Issuing of, before petition filed, for-	
under disability, sub. 81	782	bidden	663
Defensive pleadings for, need not be		is commencement of action	39
verified	116	on holiday or Sunday	664, 665
Depositions against must be taken		Officer or person, to execute sum-	
on interrogatories	574	mons	47
Evidence of how taken	540, 541	to execute generally	667
for or against, sub. 6	606	Person may be appointed to execute,	
Incompetent to testify, sub. 8	606	668,	701
Judgment against, copy of, can not		"Prevented by force" not sufficient	
be served on	415	return of	677
Notice to, service of	627	Return on, amendment of	49
when may be served on attorney .	682	Service of, at muster, election, or	
Summons on, how served in this		while attending as witness	666
State	54	when witness can not be served	
actual, can not be made out of		with summons	542
this State	56	defendant can not be summoned,	
constructive	57	when	81
Testimony of party against, not		breaking doors and buildings to	
competent, sub. 8	606	execute	675, 676
Venue of action against	69	Time of reception to be indorsed on	
		by officer	674

	SECTION.		SECTION.
Prochein ami—		Property—Continued.	
See NEXT FRIEND.		Delivery of personal. (See CLAIM AND DELIVERY)	180
Pro confesso—		Division of real	499
See JUDGMENT.		Dower, allotment of	499
Profert—		Execution from inferior court can not be levied on real	722
When to be made	120	Fraudulent sale of, authorizes attachment	194
Prohibition—		Immediate delivery of	180
Defined	479	Indivisible, proceedings to sell . 694,	695
Promise to pay value or damages—		purchaser, when entitled to . . .	698
Allegation of, must be verified, when, sub. 5	116	Joint owners of. See JOINT OWNERS.	
need not be proved unless traversed, sub. 4	126	Land, division of	499
Promissory note—		sale of, owned by infants and persons under disability	489
Action against parties to, may be joint or several	26	under judgment from inferior court	728
by assignee of, is without prejudice to defense	18	petition must describe	125
Lost, mutilated or destroyed, action on	7	Partition of real. (See PARTITION),	499
bond to be tendered defendant before, when	7	Personal, definition of, sub. 10 . . .	782
Transferred, pending action, assignee may be made party	20	Real, definition of, sub. 9	782
Proof—		Real, belonging to decedent may be sold to pay debts	429
See BURDEN OF PROOF, EVIDENCE.		conveyance of by commissioner generally	394
Amendment to conform to . . 129,	184	Sale of personal. See SALES BY ORDER OF COURT.	
Effect of variance between proof and pleadings	129,	of real. See SALES BY ORDER OF COURT.	
Failure of is not variance	181	View of real by jury	818
Order of introduction of, sub. 8 . .	317	Prosecution, criminal or penal—	
Party who begins must ordinarily finish, before	592	Admission subjecting to, need not be verified, sub. 7	116
court to control mode of interrogation	598	Provisional remedy—	
Property—		See ARREST AND BAIL, ATTACHMENT, CLAIM AND DELIVERY, INJUNCTION, RECEIVER, DEPOSIT IN COURT.	
Action for, joinder of causes of . .	88	Provisions of Code—	
personal, claimant may intervene, personal, joinder of causes in . .	88	Amendments allowed, to make pleadings conform to	184
personal, action of tenant against landlord for taking	88	Applicable to actions now pending, .	887
Answer must describe part of land claimed	125	General	668 to 699
Attachment of. See ATTACHMENT.		Miscellaneous	678 to 699
Claimant of, may intervene in action concerning	29	Rules for construction of	732
Conveyance of real by commissioner	394-400	Publication—	
Definition of real, sub. 9	782	Of notice to creditors of action, to settle decedents' estate	480
of personal, sub. 10	782	to settle trust estate	488
of generally, sub. 11	782	Public corporation—	
		See CORPORATION.	

	SECTION.		SECTION.
Public debtors—		Quarterly court—Continued.	
Provisions of Kentucky Statutes concerning, adopted	450	Interrogatories in	716
Public officers—		judgment against party failing to answer	717
See OFFICERS.		Jurisdiction of, original, page 549. appellate, page 549.	
Public works—		Jury trial, when may be had	718
Venue of action against contractor,	77	Land can not be sold under execution from	722
Puis darica continuance—		how sold to satisfy judgment	723
Supplemental pleadings allowed to state new matter	185	New trial in	714
Purchase money—		Pleadings in when may be oral	706
See BONDS.		statement to be filed	706
Purchaser of property—		Process from, to whom directed	701
At decretal sale, shall give bond	697	special bailiff may execute	701
bonds bear interest	697	who may execute	701
enforcement of	697	Records to be kept by judge	715
lien retained on property	699	lost or destroyed, how supplied	719
entitled to conveyance when sale confirmed	394	Set-off, trial of	720
entitled to possession of personal property, when	698	Statement of claim to be filed	705
Entitled to conveyance when sale confirmed	394	Subpoena from, how executed	709
to possession of personal property, when	698	Summons from	701
Fraudulent, attachment in action against	250	when returnable	706
Under execution, must look to indemnifying bond, when	643	Time of trial of cases	706, 707
attachment, payment of money by enforced by rule	282	Trial, when case stands for proceedings in	706
Pursuit—		Questions—	
Of property removed to avoid attachment	213-256	Leading, what are and when allowed,	595
Qualifications—		Que warranto—	
Bail, of	164	Ordinary action in lieu of	480
Surety, of	684	Railroad—	
may be sworn to ascertain sufficiency	688	See CARRIER, CORPORATION.	
Quarterly court—		Summons, service of in action against	51
Appeal from, how taken	724	Venue of action against	78
Appeal to, page 549.		Rate—	
Arrest and bail, trial of	721	Of damages recoverable	345
Attachments, trial of	721	Real party in interest—	
Clerk of	703	Action to be prosecuted in name of,	18
Code regulates proceedings in	700	Real property—	
Counter-claim, trial of	720	See PROPERTY.	
Docket, one to be kept	704	View of by jury	318
Equitable actions in	708	Real representatives—	
evidence in by deposition	708	See REPRESENTATIVES.	
Injunction in, trial of	721	Rebutter—	
		See PLEADINGS.	
		Allowed if necessary to form issue,	89
		Character of	100
		Not allowed except in response to affirmative allegations	112

	SECTION.		SECTION.
Receiver—		Register of land office—	
Action by	21	Evidence of, to be taken by deposition	554
Appeal from order concerning	298	personal attendance of as witness when required	556
can not be superseded	298		
Appointment of, when property is about to be removed	298	Rehearing—	
when property insufficient to pay debts	299	Court of Appeals may make rules concerning, sub. 1	760
Appointment of to take charge of attached property	218		
order concerning is final	298	Reinstatement—	
Attached property of, may be appointed	218	Action against absent defendant, of	414
allowed expenses of keeping	219	Attachment, of	267
Attorneys and parties not to be appointed	300	by Court of Appeals	269, 270
Bond and oath required of	301	Injunction of, by Court of Appeals	296, 297
Mortgaged property to take charge of	299		
Powers of, generally	302	Rejoinder—	
		See PLEADINGS.	
Records—		Allowed to form material issue	89
See TRANSCRIPTS.		but only in response to affirmative allegation	112
Book of, to be kept by justices	715	Avoidance, plea of in	99
<i>Certiorari</i> concerning, when to be granted, sub. 1	743	Caption of, what to state	110
Copies of, for Court of Appeals, how made	787	Contents of	99
may be filed by appellee	741	Departure in, forbidden	101
when to be filed	788, 740	Estoppel, plea of in	99
what to be filed with	739		
Exhibits constitute part of, if shown to have been used	128	Release—	
Lost, destroyed or mutilated, action on	7	Of bail, not affected by judgment of insufficiency	167
motion to supply in inferior courts,	719		
Original papers, transmission of to Court of Appeals, sub. 2	748	Relief—	
transmission of by justices, on appeal	725	Prayer for must be specific, or general	90
		general not granted, unless issue made	90
Redundant matter—		in other pleadings governed by rule that applies to petition	97
To be stricken from pleading	121		
Reference—		Remainder—	
Arbitrators, to. (See ARBITRATION AND AWARDS)	451	Sold on petition of owner of particular estate	491, 492
Commissioner, to. See COMMISSIONER.		Trust estate in, sale of	493
Refunding bond—			
Forms of, page 626.		Removal—	
Required of distributees and legatees in certain cases	435	Action for division of land from county to circuit court, sub. 11,	499
		Attachments pending in different courts to one court	210
Refusal of injunction—		Defendant in transitory action from county, effect of	82
Statement as to in application for injunction	278	Property of, or intent to remove, when ground for attachment, sued for, ground for general attachment	194

	SECTION.		SECTION.
Removal—Continued.		Reply—Continued.	
Pursuit of property after, to another county to avoid attachment	218	May contain, traverse	98
of property sued for after removal to another county	256	matter in avoidance or estoppel	98
Receiver may be appointed to prevent	298, 299	counter-claim against a set-off	98
		cross-petition	98
Rent—		Statements it may contain	118
Action for, is not barred by proceedings in forcible entry or detainer	468	Unnecessary, when	112
Attachment for	195		
Forms in, pages 635, 636.		Report—	
Distress warrant for. See DISTRESS.		Attorney for absent defendant, of, subs. 5, 7,	59
Forms in, pages 642, 643.		Guardian for defendant under disability	36
Repealing or vacating charters—Usurpation of office—		Reporter of Court of Appeals—	
Action for, to be ordinary	480	Duties of	766
pleadings in need not be verified, sub. 6,	116		
Action to repeal or vacate charter	481	Representatives—	
who to prosecute	481	Action against, generally on contract	26, 27
to repeal or vacate charters generally	482	by generally	21
to prevent usurpation of office	483	by personal to settle estate	428
what officers to prosecute action for usurpation	484, 485	Creditors, when barred of action against personal	488
Exercising office, after act of forfeiture, deemed usurpation	486	Controversies may be submitted to arbitration by personal, sub. 4,	451
Orders and judgment in action against usurper	487	Definition of personal, sub. 17	782
Usurper liable for fees and emoluments received	488	of generally, sub. 19	782
		of real, sub. 18	782
Replevin—		Liability of real, to direct action by creditor	484
Action of. (See CLAIM AND DELIVERY)	180	Must be party to action to settle decedent's estate	428
Replevy of execution—		Personal, definition of, sub. 17	782
Not allowed, on bond in attachment case	282	Proof of claims presented to	487
on sale bond, sub. 8	697	Revivor of actions, by and against. (See REVIVOR OF ACTIONS)	500
Reply—		of judgments, by and against. (See REVIVOR OF JUDGMENTS),	401
See PLEADINGS.		Settlement of account in county court	471
Allowed in pleading	89	in circuit court, may be recorded.	472
Avoidance, plea of in	98	Reputation of witness—	
Caption of, generally, sub. 1	110	Evidence of good character when allowed	599
when counter-claim or set-off pleaded, sub. 4	97	How attacked by party introducing, by adverse party	596, 597, 598
Counter-claim in	98	Rescue of arrested debtor—	
Cross-petition in	98	Mode of fixing and enforcing liability of officer for	175
Departure in, forbidden	101	Officer liable for, though occurring without his fault	174
Estoppel, plea of in	98	Residence—	
Filing of, in vacation	108, 109	Action for discovery of names or residence	686
in ordinary action	108	Change of, by defendant, after action brought	82
in equitable action	105, 106		
Forms of, page 622.			

	SECTION.		SECTION
Residence—Continued.		Reversion—	
Meaning of word as applied to corporations, sub. 82	782	May be sold at instance of owner of particular estate	491
Of parties to divorce suit, how proved	422	Revivor—	
Resident of Kentucky—		<i>Of actions—</i>	
Bail of arrested debtor must be . .	164	Against real representatives . . 505,	506
Next friend must be, sub. 1	37	personal and real representatives .	507
Sureties in bonds required by Code must be	684	Against representative or successor .	508
Restoration of property—		Not revived, defendant may have action stricken from docket .	511
Absent defendant, bond for, to . .	410	Order of, in what cases necessary .	500
Action for divorce, order for, in . .	425	made on motion of either party .	501
Defendant to, upon discharge of attachment, sub. 1	228	how made	501
when taken under order of delivery	188	made by consent, action stands revived forthwith	502
Restraining order—		made without consent, shall be served as summons	502
(See INJUNCTION)	271	effect of notice of	508
Retrial—		made on warning order	504
(See NEW TRIAL)	340	when made in name of representatives	509
Defendant constructively summoned entitled to	414	Time in which order of may be made, effect if not made . .	510
Infant to within twelve months after arriving at age	391	Trial shall not be postponed by reason of, after action stands revived	512
Time of upon discharge of jury before verdict	828	<i>Of appeals</i>	767
Return—		<i>Of judgments—</i>	
Amendment of	49	Death of defendant does not discharge levy, sub. 2	407
Attached property to defendant . .	228	does not prevent conveyance of property	407
Deposition to examining officer by clerk	588	does not prevent execution against survivors	405
"Not found" necessary to fix liability of bail	171	Death of plaintiff does not prevent issuing of execution	402
"No property found" authorizes action to enforce judgment .	489	indorsement to be made by clerk, who to be treated as plaintiff . .	404
Notices, of	624	quashal of execution because indorsement not proper	406
Property, of judgment for	388	Generally—	
to parties in divorce cases, order for	425	Executions of	407
Summons of, how made and corrected	49	Limitation of	508, 509
authorizing attachment	197	Non-resident, against	504
authorizing warning order, sub. 4, .	58	Notice of	502, 503
Time of, by officer to be noted by clerk	669	Petition for	501
Reversal—		Right of property—	
See APPEALS.		See CLAIMANT OF PROPERTY.	
Error must be substantial	184	Trial of by jury abolished	659
Proceedings on in court below, sub. 2,	761	Rules—	
		Common law not applicable to Code, .	733
		Court of Appeals, to be fixed by it .	760
		rules of, page 593.	
		Pleading. See PLEADING.	
		Terms used in Code, construction of, .	782

	SECTION.		SECTION.
Sales by order of court—		Sales by order of court—Continued.	
<i>Generally—</i>		Not to be made if forbidden by deed or will	492
Advertisement of must state what	696	made until title papers are filed	492
Bonds of purchasers under	697	made unless wife and children are defendants	492
interest on	697	made unless beneficial to parties	492
Dower, provision as to	495	made until bond given	498
Indivisible property	694, 695	Proceeds of, how invested or preserved	494
Lien to satisfy	692, 694	Privy examination of infant married women	498
Place of sale	696	Purchase money lien	497
Terms of, generally	696	payment of	498, 497
Time of sale	696	Trustees must give consent, when	494
<i>Of real property for debt—</i>		Satisfaction of judgments—	
Attachment under, sub. 2	229	Enforcing of—(See ENFORCING SATISFACTION OF)	489
Court may order division before sale, sub. 1	694	Entry of, in judgment book	393
Decedents' estates, in settlement of	429	Schedule—	
Lien for purchase money to be retained	699	Appeals. See APPEALS.	
Lien debts, all not due, court will not order sale, when, sub. 3,	694	Of property by arrested debtor	168
Notice of sale and terms	696	Scire facias—	
Purchaser at such sale must execute bond	697	Writ of, abolished	179
Sale of entire property, if not divisible, sub. 2	694	Secretary of state—	
to satisfy lien debt of defendant	692	Evidence of, must be taken by deposition	554
<i>Of personal property—</i>		Personal presence of as witness, how secured	556
Attached before judgment	218	Section—	
Surplus to be paid to defendant, 231, if indemnifying bond given, to be paid into court	695, 652	Defined, sub. 1	782
Suspension of, by claimant	645, 652	Security—	
When purchaser, at is entitled to possession of property	698	Additional may be required, of plaintiff in attachment	286
<i>Of real property of persons under disability—</i>		of plaintiff in injunction	288
Bond to be executed by plaintiff, sub. 1,	493	for costs	619
if not executed, sale void, sub. 3,	493	Separate-general verdict	326, 327
Compensation for dower	495	Separation of witnesses—	
Commissioner to execute judgment of sale	494	Court may order, on motion of either party	601
Death of owner before receiving proceeds, sub. 6	494	Rule does not apply to officers of court	601
General provisions concerning such sales	494-498	Service of judgment—	
Infant married woman, consent on privy examination	493	On absent defendant not under disability	415
Interested persons must be parties, sub. 7,	494	how made	416
Joint estate, sale of interest in	490		
Lunatics of	489		
May be ordered for payment of debts	489		
for support of infant or person of unsound mind	489		
for reinvestment	489		

	SECTION.		SECTION.
Service of process—		Shakers—	
See PROCESS.		How summons may be served on . . .	55
Set-off—		Sham pleadings—	
Absent defendant against	418	Forbidden, sub. 8	118
Allowed in answer only	95, 111	Sheriff—	
Answer may contain	95	Action against for personal property	
Assignee against	19	levied on	81, 82
Assignment of note is without prej-		plaintiff in process may be sub-	
udice to	19	stituted as defendant for . .	82
Caption of answer must mention,		Affidavit as to qualification of surety	
sub. 4,	97	taken by	688
Defined, sub. 2	96	as to qualification of bail may be	
Demand for is action, sub. 84 . . .	782	taken by	164
Disclosed, must be allowed absent		Arrest of defendant by. (See AR-	
defendant	418	REST AND BAIL)	152
Failure to plead does not waive . .	17	Attachment, how executed on per-	
Inferior courts' proceedings on . .	720	sonal property	208
Judgments on	887	how executed by upon real prop-	
for money may be set-off	377	erty	208
against which set-off may be used,		personal property to be first taken,	
may be enjoined	878	how executed by upon fund in	
Need not be set up in answer . . .	17	court	207
Pleading that may be	111	expense of keeping property taken	
Proceedings on against new parties,		under allowed to	219
sub. 3,	97	before levy of, may require bond	
Provisions concerning relief appli-		of indemnity	211
cable to petitions, apply to . .	97	Breaking of building by, to execute	
Summons not required	97	order of arrest	676
Trial of	97, 872	to execute order of attachment .	675
Writing, on which founded must		Clerk's office, to visit daily . . .	46
be filed, or accounted for . . .	120	Deputy may act for	678
Settlements of estates—		Distress warrant. See DISTRESS	
Provisions of Ky. Stat. concerning		WARRANT.	
adopted	471, 472	Execution. See EXECUTION.	
may be recorded, amendment to,	472	Judgment against, on motion for	
Of decedents—		money collected	444
Action for allowed, sub. 1	428	Jury may be placed in charge	
all persons interested must be		of	818, 819
made parties to, sub. 2	428	Levy of execution on joint property,	
Claims against, to be proved . . .	437	Liable for insufficient surety . . .	660, 683
Commissioner must be appointed in		May require plaintiff in execution to	
by court or clerk	430, 481	defend action	31
Creditors must be notified of . . .	430	Meaning of word, sub. 15	782
appearing, become parties to . .	432	Notices, service of	624
not appearing, effect	433	Officers who are included by the	
not appearing, effect	434	word, sub. 15	782
Distributee liable to creditors . . .	434	Order of delivery to be executed by,	
Injunction may be granted in . . .	436	Process, direction of, to, generally .	667
Legatee liable to creditors	434	from inferior courts	701
Recording of	472	Punishment of, for not serving	
Reference to commissioner	430	notice	688
notice to creditors	430	Return of summons by	49
vacation in	431	correction of by	49
clerk may make	431	of notice	624
Refunding bond to be given	435	Return of bonds of indemnity by .	641
Venue of	65	of bond to inferior court	651
Of trust estates—		of bond of claimant	647
Provisions applicable to decedents'		Special bailiff appointed by	47
estates apply to	438	Surrender by, of property of tenant	
		levied on	38

	SECTION.		SECTION.
Sheriff—Continued.		Special proceedings—	
Trial of right of property by sheriff and jury abolished	659	Defined	3
Writs of forcible entry and detainer, duties of concerning	454, 456	Provisions concerning actions apply to, sub. 84	732
Sickness—		Special verdict—	
Of juror, cause for discharging jury	822	See VERDICT.	
Signature—		Specific attachment—	
Includes mark, sub. 7	732	(See ATTACHMENT.)	249
Of party to exhibit deemed ad- mitted, unless	527	Specific personal property—	
Signed—		(See CLAIM AND DELIVERY)	180
Pleadings to be	115	Specific relief—	
Similiter—		See RELIEF.	
In pleadings, not allowed	112	State—	
Singular—		See COMMONWEALTH.	
Defined, sub. 4	732	Statement—	
Sinking fund commissioners—		Of case for defendant	317
Venue of action against	68	for defendant	317
Slander—		To be filed by appellant with trans- cript	739
Allegations of, petition for	123	Statute—	
Defense that may be made	124	See KENTUCKY STATUTES.	
Smallness of damages in, not ground for new trial	341	Judgment for damages given by	389
Venue of action for	74	Private, how pleaded, sub. 2	119
Smallness of damages—		Steamboats—	
Not ground for new trial in action for tort	341	Expenses of officers for keeping limited	219
Soldiers—		Subpoena—	
Evidence of to be taken by deposi- tion	554	Acknowledgment of service	533
Personal attendance of as witness, how secured	556	Clerk to issue	529
Special bailiff—		Commissioner to issue	530
Process executed by	667	Court may appoint person to execute,	668
from inferior courts	701	Defined	528
Summons executed by	47	Disobedience of, how punished, 535-539	
Special damages—		<i>Duces tecum</i> against witness	528
Given by statutes, how judgment ren- dered for	889	against clerk of inferior court, sub. 2,	743
Special demurrer—		<i>Forms of</i> , page 643.	
(See DEMURRER.)	92	Holiday, issual and execution on, 664,	665
		Issuing of, by clerk	529
		by officer authorized to take dep- ositions	531, 578
		in inferior courts	702, 703
		Officer who may execute	533, 667
		Service of, how made	532
		by whom made	533
		from inferior courts	709

	SECTION.		SECTION.
Subpoena—Continued.		Summons—Continued.	
Sunday, issual and execution on, 664, 665		Appeal on, from inferior courts . . .	724
Submission—		Builder, service on	51
Of subject of controversy to court . . .	637	Carrier, service on	51
to arbitration	451	City, service on	51
Party may dismiss action before . . .	871	Constructive service	57, 58
may strike out cause of action before	84	actual service after	61
		takes effect, when	60
Subscription—		personal judgment forbidden on . . .	419
Word includes mark, sub. 7	782	Copy for each defendant	42
Substitution—		Corporations and counties, service on	51
Claimant for defendant	30	County service on	51
Pending action	20	Court may appoint person to serve . .	668
Plaintiff in execution or distress for officer sued	82	Delivery of, to officer	45
		Direction of, generally	667
Successive actions—		from inferior courts	701
May be maintained on same contract	686	<i>Forms of, page 624.</i>	
Successor—		Form and requisites of	40
Definition of word, sub. 20	732	Holiday issual and service on . 664, 665	
Entitled to execution on judgment, sub. 1, 402		Infants under fourteen years, service of, on	52
Revivor of actions and judgments, for and against. See REVIVOR.		Issuing of	39
Sue—		Joint stock company, service on . .	51
What the word refers to, sub. 37 . .	782	to any county	41
Sufficiency of pleadings—		copy for each defendant	42
Rules to determine, are those described by Code	88	Manner of serving	48
Suggestion—		Non-resident, service on	61, 56
That debt has become due, <i>pendente lite</i> , effect of	185	Officers authorized to execute, 47, 667, 701	
Summary proceedings—		Partnership service on	51
Judgments obtained on motion . . .	444	Person may be appointed by officer to execute, sub. 2	47
Motion for judgment allowed by sureties, clients, clerks and officers	444	Prisoners, service of, on	54
deemed abandoned when	447	Return, day of	44
made on any day of the term . . .	448	Return of, generally	49
made on ten days' notice	445	amendment of	49
made according to notice	447	"prevented by force," not sufficient	677
Notice, what it must state	446	from inferior courts, where to be made	710
Pleadings on, may be oral or written	449	to be entered on docket by clerk . .	670
Trial of, must be according to law and equity	449	Service of, actual	48
Summons—		acknowledgment of	50
Acknowledgment of service	60	after constructive may be made . .	61
proof of	50	manner of	48
Actual service	47, 61	on corporations and counties . .	51
		on community of Shakers	55
		on persons of unsound mind . . .	53
		on infants under fourteen years of age	52
		out of the State	56, 416
		out of the State does not authorize personal judgment . . .	419
		from inferior courts	701
		Shakers, service on	55
		Sheriff to attend clerk's office to receive daily, except Sunday . .	46
		to indorse time of reception of . .	674
		Sunday issual and service on . 664, 665	
		Time fixed in for return	48
		Town, service on	51
		Transitory action on	79, 80

	SECTION.		SECTION.
Sunday—		Surrender—	
Issuing and service of process on	664, 665	By bail, of debtor to court or officer	169, 170
Supersedeas—		Survey—	
Bond for	748	Order of may be made by clerk in vacation	671
before whom to be executed . . .	749	Service of process on person attend- ing	666
damages on	764		
Defined	752	Survivor—	
<i>Forms concerning, pages 650, 651.</i>		Execution, may issue for	402
Issuing of, sub. 2	749	may issue against	405
Motion to discharge	750		
Not allowed on appeal from order concerning receiver	298	Survival of cause of action—	
Of part of judgment	751	(See REVIVOR)	500
Supplemental pleadings—		Suspension—	
Alleging facts, occurring since former pleading	185	Of sales under execution and dis- tress warrants. See BONDS.	
Sureties—		Taxes—	
Action of, against principal or co- surety after debt matures . . .	661	Affidavit for order of delivery to state property was not taken for	181
provisional remedies in	662	Garnishment of officer holding prop- erty taken for	208
against principal or co-surety be- fore debt matures	287	On appeals	746
provisional remedies in	288	Tenant—	
Motions by or against	444	Action by, for property distrained, .	38
against principal	444	Bond of, to discharge levy of dis- tress warrant	653
Notice of motion, how given, and requisites of	445, 446	to discharge levy in part	658
proceedings on	449	motion on for judgment	654
Proceedings against after bank- ruptcy of principal	698	trial of motion	655
Qualifications of	684	judgment on motion	657
affidavit concerning	688	For life, action for sale of remainder or reversion	491
Surgeon—		In common, embraced by word joint tenant, sub. 28	782
How evidence of must be taken . .	554	Tender—	
Personal attendance of as witness, how secured	556	(See OFFER TO COMPROMISE) . . .	684
Surplus—		Tense—	
Of attached property to be returned to defendant	281	Defined, sub. 2	782
Of proceeds of sale under execution or distress warrant	644	Term of court—	
Surprise—		Power of judge over judgment, after expiration of	518
Grounds for new trial, sub. 8 . . .	340	Terms—	
Surrebutter—		On which pleadings may be amended, .	184
Allowed if necessary to form issue .	89		
Departure in, forbidden	101		
What it may contain	100		
Surrejoinder—			
Allowed if necessary to form issue .	89		
Departure in, forbidden	101		
What it may contain	100		

	SECTION.	Title—	SECTION.
Terms of sale—			
Property under decree	696	Defined, sub. 1	732
Testimony—		Town—	
See EVIDENCE, DEPOSITIONS, ORAL TESTIMONY.		Summons against	51
Things in action—		Transaction—	
Action by assignee of	19	Successive actions may be main- tained upon	686
for discovery of	439	Transfer—	
Time—		Actions, from one docket to an- other	8
Mode of counting between acts . .	681	from one court to another	18
Time of pleading—		Attachments pending in different courts	216
<i>In circuit court—</i>		Bond, when defendant required to execute before	14
Court may extend time of	107	Court may order	10
Defense in equitable action, time of filing	102	Equitable action to ordinary docket, Ordinary action to equity docket, 10,	11
if summons not executed in time, reply and subsequent pleadings, 106, 106	104	Plaintiff may file affidavit, and re- quire defendant to execute bond	14
Defense in ordinary action, time of filing	102	Waiver of right to transfer action .	15
time of filing other pleadings . .	108	Transcript of records—	
Non-resident may file defense before judgment	408	See APPEALS TO COURT OF AP- PEALS.	
may filed efense within five years, time reduced to one year, how . .	414	Inferior courts from	724
<i>In justices' and quarterly courts,</i>	706, 707	Transitory actions—	
Time of sale—		Venue of and service of process in	78-82
Property under decree	696	Traverse—	
Time of trial—		Answer may contain	95
Absent defendant, action against, 80, 102		Defendant constructively sum- moned, when necessary, by . .	409
Appeals, in Court of Appeals . . .	753	Defined	113
from justices' and inferior courts, Equitable actions, of, during motion hour	726	Knowledge or information, denial of, Reply, rejoinder and subsequent pleadings may contain . .	118
on third day of term	357		98-100
after expiration of motion hour .	360	Treasurer of state—	
generally	358	Evidence of, to be taken by deposi- tion	554
if interrogatories annexed to a pleading	364 to 367	personal attendance of, as witness, how secured	556
if no issue of fact made by answer, if summons served on only part of the defendants	366 367	Trespass—	
Justices' courts, in	706, 707	Action for, not barred by proceed- ings in forcible entry	468
Motions	356	Attachment in action for, not granted against certain per- sons	194
Ordinary actions, of, after expira- tion of motion hour	358	not granted against defendant, on ground of insolvency	194
on each day of term	359		
generally	363		
in tort, where summons not served on all defendants	363		
Police courts, in	706		
Quarterly courts, in	706		

	SECTION.		SECTION.
Trial—		Trial—Continued.	
<i>Generally—</i>		<i>By jury—</i>	
Argument	817	Depositions, exceptions to, to be	
Attachments of	264	taken before	587
Burden of proof	817, 528	Discharge of jury, causes for . . .	322
Claimant's bond, of motion on . .	648	Formation of jury	316
Commencement of	590	Forcible entry and detainer in . .	454
Continuance	815	Information may be asked for by	
Counter-claim of	97, 372	jury	321
Court by	812, 818, 846	Issues of fact, when to be by,	
Damages recoverable	345	812, 813,	331
Defined	311	when to be by in action for tort .	331
Equity actions of	360, 361, 364	Order of	317
plaintiff may demand trial, when,	366	Right to, cause for transfer of ac-	
trial as to part of defendants . .	367	tion	10
Instructions	317	Value in controversy which entitles	
Issues, how tried	312	party to	713
Jury trial	331, 350	Verdict in, how reached	319
waiver of	381	how rendered	324, 325
view of place or property by . .	318	if not rendered, case to be re-	
duty of after submission	319	tried	323
court to admonish	320	View of place or property by jury .	318
information as to evidence after		Waiver of right to jury trial . . .	312
submission	321	in action for tort	331
as to law	321		
Law and facts separately stated by		Trustees—	
court	382	Action by, generally	21
New trial, grounds for	340, 518	for settlement of estates	438
not in divorce case	344	Consent of to sale of property of	
Ordinary actions in	358, 359, 363	person under disability	494
Poll of jury	324	May submit to arbitration	451
Set-off, of	97, 372	Sale of real property by	496
Tenants' bond to discharge dis-		Settlement of accounts of, in coun-	
tress	655, 656	ty court	472
Verdict	325 to 327	may be recorded, amendment to .	472
<i>By the court —</i>			
Actions for division of land, or al-		Trust estates—	
lotment of dower, sub. 10 . . .	499	Action for settlement of	423
Attachment shall be tried by . . .	264	provisions applicable to	438
Continuance of	315	Demands against to be verified . . .	437
Issues of law must be tried by,		Sale of	498
sub. 1,	312	remainder in	498
of fact which must be tried			
by	312-2, 313	Truth—	
of fact in action for tort, may be		Mitigating circumstances, and, may	
tried by, sub 1	331	be pleaded	124
Forcible entry and detainer. (See			
AMENDMENT To)	454	Turnpike—	
Law and facts to be separately		Venue of action against contractor	
stated	382	to build	77
Law, to be tried by, sub. 1	312		
Manner of, in action for tort, sub. 2,	331	Umpire—	
Motions	449	(See ARBITRATION AND AWARD) . .	451
Order in which action shall be			
tried	314	United States—	
Postponement of	315	Definition of word, sub. 22	732
Separation of law and facts	332		
Time of trial. See TIME OF TRIAL.		Unavoidable casualty—	
<i>By jury—</i>		Ground for new trial, sub. 7	518
Admonition to jury, permitted to			
separate	320		
Commencement of	590		

	SECTION.		SECTION.
Unknown defendant—		Vender—	
Action for discovery of, when allowed	685	Entitled to attachment against fraudulent purchaser . . .	250
Description of, in petition and process	691	Venue of actions—	
by amended petition, if name and residence discovered . .	691	Absent defendants, against	75
Provisions concerning non-residents apply to	691	Alimony, for	76
Warning order against	57, 58	Banks, against	71
		Board of education, against	68
Unsound mind—		Change of in circuit court, page 571, inferior courts, page 578, criminal cases in, page 575.	
See PERSON OF UNSOUND MIND.		Commissioners of sinking fund, against	68
Usurpation of office—		Common carrier, against	78
(See REPEALING OR VACATING CHARTER)	480	Contractor of public works, against, Corporations generally, against . .	77
Vacating charter—		Decedents' estate to settle	65
(See REPEALING OR VACATING CHARTER)	480	partition of	66
Vacating judgments—		sale of	66
Court that may	513, 518	distribution of	66
Injunction pending proceedings . .	528	Distribution of decedents' estates, Divorce, for	66
Ordinary action in equity	17	Enforcement of judgments, for . .	70
Petition for	520	Fine or penalty, for	68
See APPEALS.		Forfeiture, for	68
Vacation—		Guardian, against by ward	67
Clerk may appoint guardian <i>ad litem</i> during, sub. 2	88	Injury to character or person, for .	74
may make order of survey during, may make order of reference to commissioner in	671	to real property, for	62
Filing pleadings during	108, 109	Inmates of asylums, against	69
Judge may allow party to sue <i>in forma pauperis</i> during	87	Insurance companies, against . . .	71
Value—		Lunatic, against	69
Allegations of, must be proved when	126	Non-residents, against	51, 75
need not be verified when, sub. 5 .	116	Officers, against for breach or neglect of duty	68
Matter must exceed \$25 to authorize injunction	284	on bond of	68
must exceed \$20 to entitle party to jury trial	718	Partition of real property, for, 62-2, Penalty to recover	68
Specific property claimed, value of must be fixed in judgment . .	388	Prisoners, against	69
Variance—		Probate of wills, for	64
Between pleading and proof, when material	129	Railroad, against	78
immaterial, how cured	180	Real property, for recovery of . .	62
total, is failure of proof	181	Return of <i>nulla bona</i> , on	70
Contract concerning	181	Transitory	78-82
See amendment to	181	Ward against guardian	67
		Wills concerning	64
		Venue, change of—	
		(See CHANGE OF VENUE) page 571.	
		Verdict—	
		Announcement of	324
		Evidence against, grounds for new trial	340
		General, separate-general or special, General, defined	326
		must assess amount of recovery .	329
		How arrived at	319
		How rendered	324, 325

Verdict—Continued.

	SECTION.
Judgment contrary to, when to be rendered	386
to conform to	384
exception	384
court to direct	385
against verdict	386
Jury may find either general, separate-general or special	327
must find either, as directed	327
Law against, grounds for new trial,	340
New trial, not more than two because verdict against evidence	341
Poll of jury	324
Separate-general, defined	326
shall prevail over general, if inconsistent	327
Signed by foreman	325
Special defined	326
must prevail over general, if inconsistent with it	328
repeal of provisions concerning amendment to	326
Value of specific property and damage, must be fixed in	330
Written to be	325

Verification—

Attorney or agent may make, sub. 8,	117
Defined, sub. 24	732
Forms of, page 627.	
Interrogatories, of answers to	148
Objection for want of, waived when,	188
Oral pleadings of not required	705
Other or greater proof not required because of, sub. 5	117
Petition may be on or before the calling of the cause	187
Party may be required to make, in person, sub. 4	117
Pleadings of, when required	116
by whom to be made	117
amendments, provisions as to	139

Verified—

Includes what, sub. 24	732
----------------------------------	-----

Vested interest—

Word "property" applies only to, sub. 11,	732
---	-----

View—

Of property or place by jury	318
--	-----

Void judgment—

Appeal from, not allowed before motion to set aside	763
---	-----

Waiver—

Depositions, exceptions to	589
Error, as to form of action	15
as to misjoinder of causes of action	86
as to verification of pleadings	138
in pleadings	92-4, 118
Right of trial by jury generally	312
in action for injury to person or character	331
Special, demurrer of	92, 118

Ward—

See GUARDIAN.

Venue of action against guardian	67
--	----

Warning order—

Affidavit required to obtain	58
who may make affidavit	58, 550
effect of as to facts stated, sub. 6,	58
Form of, page 628.	
effect of	58
requisites of	58
Against whom granted	57
Attorney for defendant to be appointed	59
duties	59
compensation	59
powers	59
report by	59
Clerk to make, when	58
Corporation against	57
Court of Appeals, in, sub. 8	736
appellant to file statement if he wishes, made, sub. 1	739
appellant to file affidavit for, sub. 2,	739
Defendant deemed summoned thirty days after	60
may be actually summoned after,	61
Form of, page 625.	
Non-resident against	57
Return of officer which authorizes, sub. 4,	58
Revivor of actions, how and when made in proceeding for	504
Time of filing defense after	107

Warrant—

Forcible entry and detainer in	454
Form of, for arrest of witness, page 643.	
Witness, for arrest of	537

Warranty of title—

Conveyance by commissioner, sub. 2,	49
---	----

	SECTION.
Waste—	
Action for, is not barred by proceedings in forcible entry and detainer	468
Restrained, pending traverse . . .	467
Wife—	
See MARRIED WOMAN, HUSBAND.	
Wills—	
Venue of actions and proceedings concerning	64
Witness—	
Action against when not allowed .	542
Adverse party may be	606
Attesting witnesses, provision as to, .	606
Attendance of, how compelled . . .	528-538
not required more than twenty miles from residence	584
not required to give deposition out of county	584
Can not be re-examined without leave	600
Character of may be supported by evidence when attacked	599
Competency of, generally	605-607
attesting witnesses, sub. 11	606
attorney, clergymen and priests, sub. 5,	606
convict in penitentiary, sub. 8 . . .	606
husband and wife, sub. 1	606
party as to entries made by him, sub. 7,	606
against defendant constructively summoned, sub. 8	606
against deceased person, subs. 2, 6,	606
against person under disability, subs. 2, 6, 7,	606
after introducing other proof, sub. 4,	606
Concealment of minor witness, punishment for	585
Contempt, punishment for	588
Contradictory statements of	596
witness to be inquired of before proving	598
Continuance, because of absence of, to obtain personal presence of . .	556
Costs, liable for, when	586
Damages, when liable for	586
Dead person against	606
Deposition of, <i>de bene esse</i>	558
how taken and written	579, 580
Depositions of, generally. See DEPOSITIONS.	
Examination of in court	546, 592
direct and cross-examination, what is	594
person present may be examined, .	602

	SECTION.
Witness—Continued.	
Facts which affect the credibility of	607
<i>Forms of subpoena and warrant</i> , page 648,	
Good character of	599
Impeachment of	596
In jail or prison, how evidence of taken	540
Infant against	606
Insulting or vexatious questions to, forbidden	579, 598
Interrogatories to	578
Judge or juror may be called as witness	608
Leading questions to	595
Lunatic against	606
Officers, physicians and other persons, whose depositions may be taken	554
Party filing interrogatories may testify as to new matter in,	608, 609
Party can not testify as, when. See COMPETENCY, <i>Supra</i> .	
Personal presence of, how obtained, .	556
Proof of writing by	552
Punishment of, for refusing to testify	585-589
Re-examination of	600
in taking deposition	558
Separation of	601
Subpoena for. See SUBPOENA.	
<i>duces tecum</i> for	528
Suit against, when not allowed . .	542
Warrant of arrest for	587
Writing, to be submitted to	604
Woman—	
Defendant interrogatories may be propounded to	148
Words—	
Definition of	782
Work, public—	
Venue of action against contractor for	77
Writ—	
<i>Capias ad satisfaciendum</i>	168
Definition of word, sub. 27	782
Forcible entry and detainer of . .	454
Holiday, issual and service on, . .	664, 665
Injunction, of, abolished	271
Mandamus	474
<i>Ne exeat</i> , of, abolished	688
Prohibition	479
<i>Seire facias</i> , of, abolished	179
Sunday, issual and service on, . . .	664, 665

	SECTION.		SECTION.
Writing—		Writing—Continued.	
Act of adverse party, may be read unless denied	527	Oral proof of, in equity action . . .	552
Constituting foundation of action must be filed or accounted for	120	of, in ordinary action	604
Constituting evidence may be filed .	128	Pleadings founded on need not be verified	116
Disputed handwriting, evidence as to, amendment to	604	in actions for over \$50 must be in writing	115, 706
Includes printing, sub. 6	782	Year—	
Lost, action on	7	Defined, sub. 25	732

INDEX TO CRIMINAL CODE.

	SECTION.		SECTION.
Accomplice—		Allegation—Continued.	
Testimony of must be corroborated, 241		Libel, what sufficient in indictment	182
acquittal, if not sufficient 242	•	Perjury or subornation of, what	
		sufficient in indictment for . 134	
Acquittal—		Amendments and acts—	
Bars prosecution for same offense, 176		<i>Amendments—</i>	
prosecution for any degree of of-		Attorney-general, fees in Court of	
fense 177		Appeals 354, 356	
Form of, plea of former 164		Bail during adjournment of ex-	
Judgment of, in felony case not re-		amining court 55	
versed 339		Constable may take bail 28	
in misdemeanor, when not to be		Depositions for defendant 153	
reversed 352		Error must be substantial to war-	
Reasonable doubt as to guilt er-		rant reversal 340, 353	
titles defendant to 238		Examining court, bail during ad-	
		journalment of 55	
Adjournment—		Fees of attorney-general in Court of	
Examining court may adjourn two		Appeals 354, 356	
days 54		Grand juror may disclose proceed-	
Final, of court discharges jury . . 254		ings 113	
Admonition—		Jurisdiction of justices increased . 13	
By the court to jury at each ad-		Jury, view of place by 236	
journalment 246		Justices, jurisdiction of, increased . 13	
Affidavit—		Libel, against newspaper, venue of, 21	
As basis for taking deposition . . . 153		Magistrate may summon witnesses	
As to what absent witness would		to ascertain offender 32	
testify 189		Newspaper, venue of 'prosecution	
Continuance, for 189		for libel 21	
Magistrate to require, before issuing		Officer may arrest in adjoining	
warrant in felony 31		county, when 36	
May be read as evidence on trial		Place, view of by jury 236	
under writ of <i>habeas corpus</i> . 413		Riots, routs, breaches of the peace,	
Objecting to magistrate in examin-		jurisdiction of justices in . . 13	
ing court 52		Witnesses, magistrate may summon	
to officer presiding at trial under		to ascertain offender 32	
writ of <i>habeas corpus</i> 418		Acts—	
Allegation—		Conspirator may testify . . . 223, 234	
As to person injured, or owner of		Continuance, provisions concern-	
property, when not material . 128		ing 189	
As to time, is generally imma-		County judge, jurisdiction in mis-	
terial 129		demeanors 25	
Embezzlement, what sufficient in		Defendant can testify in his own	
indictment for 135		behalf 223	
Judgment, what necessary in plead-		Examining courts, who to hold	
ing 131		Felony, no warrant for until affida-	
Larceny, what sufficient in indict-		vit filed 31	
ment for 135		Jurors, grounds of challenge to . . 209	
		Qualifications of juror 203	
		Witness, procuring attendance of	
		non-resident 151	

	SECTION.		SECTION.
Appeals to the Court of Appeals—		Appeals to the Court of Appeals—Continued.	
<i>In felonies—</i>		<i>In misdemeanor—</i>	
Bill of exceptions must show all instructions	341	Jurisdiction of court	347
Commonwealth by, shall not suspend proceedings	335	Manner of appealing	348
how taken by	337	Penal actions in	355
form of order noting prayer for, page 674.		Summons not necessary on	351
time of appealing	337	Supersedeas, form of, page 675.	
Death, proceedings upon affirmance of judgment	346	bond, form of, page 675.	
of accused terminates	342	execution not suspended unless bond executed	349
Defendant can only take from final judgment	335	Trial of	357
how taken by	336	time of	358, 359, 360
form of order noting prayer for, page 674.		<i>General provisions—</i>	
no appeal nor reversal after death of	342	Appeal, when stands for trial	358, 359
if in penitentiary, shall remain pending	343	to be decided at term when tried	360
to be removed upon reversal	344	to take precedence on docket	357
if again convicted, credit for former confinement	345	Costs to be taxed against defendant, Trial of	361
time of appealing	336	time of	358, 359, 360
Felony cases, may be taken in	334	Appeals to circuit courts—	
Instructions, bill of exceptions to show	341	Attorney's fee and costs taxed on affirmance	367
Judgment of acquittal not to be reversed	339	Bond for costs to be given	364
of conviction, reversal for substantial error	340, 353	form of, page 676.	
of death, proceedings upon affirmance of	346	proceedings on	370
Jurisdiction of court	334	to suspend judgment	365
Summons nor notice not necessary on	338	Case to be tried anew on appeal	366
Suspension of judgment pending	336	Commonwealth can not appeal to	363
Time of trial	357 to 360	Costs and attorney's fee taxed on affirmance	367
<i>In misdemeanor—</i>		County judge, from judgment of in misdemeanors	25
Appeal, how taken by defendant	348	bond for to be given	364
form of order granting, page 675.		Defendant may appeal to	362
does not suspend execution without supersedeas	349	how appeal taken by	364
in penal action, regulated by Civil Code	355	when must be taken	369
damages on affirmance of, if bond executed	356	form of certificate of, page 677.	
Attorney fee to be taxed if Commonwealth successful	354	money paid by to be returned to if acquitted	368
Bond to suspend judgment	349	Execution, how suspended pending appeal	364, 365
Commonwealth, how taken by	350	Form of certificate of, page 677.	
Damages on affirmance of, if bond executed	356	bond for costs, page 676.	
Errors that authorize reversal	353	appeal and supersedeas bond, page 676.	
Form of supersedeas bond, page 675, of supersedeas, page 675.		supersedeas, page 676.	
Judgment of conviction to be reversed for substantial error	353	Jurisdiction of court	362
of acquittal not to be reversed if penalty may be imprisonment	352	Money, collected after appeal to be paid into court	365
		to be paid to defendant if acquitted	367
		Proceedings on appeal bonds	370
		Supersedeas, form of, page 676.	
		bond, form of, page 676.	
		Time to appeal	369
		Trial of appeal	366
		Argument—	
		If more than two shall alternate	228
		Order of	227

	SECTION.		SECTION.
Arraignment—		Attachment—	
Defendant must plead when	157	Commonwealth may have, after forfeiture	95
Defined	454	Form of, for witness, page 655.	
Only in felonies, and may be dispensed with	155	Person refusing obedience to writ of <i>habeas corpus</i>	409
Arrest—		Attorney at law—	
Bail may arrest defendant	87	May sign application for bail	81
arrest of defendant out on	99	Not to be taken as bail	80
clerk to issue warrant for	100	Attorney for the Commonwealth—	
Defendant may be arrested after giving bail	99	Appeal on behalf of Commonwealth, in felony	387
Door may be broken to make	40	in misdemeanor, may be taken by,	350
How made	42	Duty of, to advise grand jury	109
no unnecessary force to be used . .	43	to state case to jury	220
How officer to proceed under warrant of	45	Fees of, see amendment to . . 354,	356
Judge may orally order	38	May dismiss indictment by leave . .	243
Magistrate may order, orally when, .	38	order summons on forfeited bail bond	94
No unnecessary force to be used . .	43	Notice to, of application for return of money deposited as bail	88
Officer may break doors to make arrest	40	To proceed upon breach of bond to keep the peace	392
how to proceed under a warrant . .	46	Witnesses before grand jury may be examined by	109
may summon assistance	41	Attorney-general—	
penalty for refusing	41	Fees of, see amendment to . . 354,	356
may arrest insane, drunken or disorderly persons	394, 395	Record transmitted to, on appeal by Commonwealth	387, 350
Peace officer, may make arrest, when	35, 36	Bail—	
may arrest insane, drunken or disorderly persons	394, 395	See BAIL BOND — DEPOSIT IN LIEU OF BAIL.	
Peace warrant, how ordered on . .	383	Admission to, defined	72
Person arrested to be notified . . .	39	Allowed before conviction	74
charged with offense to be arrested	8	not after	75
Private person, may make	35, 37	Application for, how made	81
person when may make arrest . . .	38	Arrest of defendant by	87
Prisoner escaping may be pursued .	44	Attachment against property of . .	95
Proceedings on arrest without a warrant	46	Attorney not to be taken as	80
Unnecessary force not to be used . .	43	Bench warrant, to be indorsed on . .	143
Warrant for	26	officer, how to proceed under . . .	145
form of	27	Bond, defective, effect of	85
		if sufficient in substance, not invalid	85
Arrest of judgment—		to appear in another county transmitted by mail	34, 47
Court may arrest without motion . .	278	taken by sheriff, delivered to proper officer	33
may detain defendant for further proceedings after	279	form of	82
Defendant may be detained for further proceedings if judgment arrested	279	Forms of, page 656.	
Defined	275	Certain officers not to be taken as . .	80
Grounds for	276	Clerk not to be taken as	80
Motion in arrest of, defined	275	Commissioner not taken as	80
when must be made	277	Constable may take	28
Proceeding if arrested	279		
Time motion to be made	277		
Articles of impeachment—			
Defined	431		
What they must state	432		

Bail—Continued.

	SECTION.
Court may discharge forfeiture when	96
may remit bond before judgment, to fix amount on bench warrant .	141
Defendant arrested for misdemeanor may give	28
charged with offense in another county may give	46
may remain on bail during trial for misdemeanor	184
remain on bail in felony case .	183
be surrendered by bail	86
be arrested by bail	87
discharged by deposit of money on bail when indicted may be arrested	141
on bail, may be again arrested, when	99
when entitled to bail, after re-arrest	100
Deviation from direction in sec. 28 does not invalidate bond . . .	30
Examining court, order of commitment, to fix amount of . . .	67
must take, if sufficient bail be offered	67
Execution on judgment against . .	302
Exonerated by final dismissal of charge by grand jury	115
Felony trial, pending	183
Form of bonds, page 656.	
for examination of bail on oath, page 658.	
Forfeiture of bond given during examination	58
how bail forfeited	93
proceedings upon	94
Commonwealth may have attachment	95
court may discharge if defendant appear	96
Habeas corpus to obtain	426
In what cases allowed before conviction	74
Indorsement as to, made upon bench warrant	143
not to be made if offense not bailable	145
Insufficient not to be taken	78
Justices disagreeing in felony case, smaller amount to be taken . .	71
Justices' court may admit to, during adjournment	324
Magistrate in other county may take	46
bond taken by, sent by mail . . .	47
May arrest defendant or have him arrested	87
surrender defendant in discharge of bond	86
be given pending adjournment of examining court	55
Misdemeanor cases in	28, 184

Bail—Continued.

	SECTION.
Not allowed after conviction . . .	75
Of what the taking of bail consists, Officers taking to fix day for appearance	29
who may take	28, 83, 84
not to be taken as	80
Order of commitment from examining court to fix amount . . .	67
Police or city court may hold to . .	309
Proof of qualifications of	77
Proceedings upon forfeiture	94
Qualifications of	76
Several may be taken as	79
Sheriff may take, in what cases . .	83
not to be taken as	80
Substance and form of bond	82
Surrender of defendant discharges .	86
Taking of consists of what	73
To be taken if sufficient in the aggregate	79
What peace officers may take . . .	84
Who may take bail after commitment	68

Bail-bond—

Effect of bond defective	85
Forfeiture of	93
proceedings upon	94
court may discharge	96
disposition of money deposited . .	97
remission of	98
during examining trial	58
Forms of bail bonds, page 656.	
How forfeited	93
Irregularities not to invalidate bond,	84
Officers not to be taken on	80
Proceedings on forfeiture	94
Substance and form of	82
When court may remit forfeiture . .	97

Bank notes—

Sufficient description of, in indictment for larceny or embezzlement	135
--	-----

Bar—

Acquittal or conviction, for same offense is	176
bars prosecution for any degree . .	177
Dismissal of indictment, will not, when	178, 243
by attorney for Commonwealth does not	243
Judgment on demurrer is, when . .	169

Bench warrant—

Bailable offense, how officer to proceed	144
Court, to fix bail on ordering . . .	141
may order bench warrant on any indictment	149

	SECTION.
Bench warrant—Continued.	
Defined	139
Form and substance of	142
form of, page 654.	
indorsement on, as to bail, page 654.	
How officer, other than sheriff, executing, to proceed	144
Indorsement on, as to bail	148
May be reissued by order of attorney for Commonwealth	140
be ordered for defendant already on bail	141
To be issued by order of court	140
To issue for defendant already on bail, if offense not bailable	145
When may be issued	149
Bias—	
Actual or implied, is ground for challenge	208
Actual defined	209
Implied defined	210
Bill of exceptions—	
Exceptions noted of record, how bill of, prepared	282
Form of and rules for preparing, pages 645, 646.	
Must show all instructions given	341
What decisions are subject to exception	280
decisions are not subject to exception	281
Body—	
Of person detained, may be taken by person executing writ of <i>habeas corpus</i>	405
When must be produced on return of writ of <i>habeas corpus</i>	411, 412
Bond—	
See BAIL-BOND — SECURITY TO KEEP THE PEACE.	
Appeal bond on appeal to circuit court	364
Form of, that may be required before issuing writ of <i>habeas corpus</i> , page 678.	
appeal bonds, pages 674–676.	
appeal and supersedeas bond, on appeal to circuit court, page 676.	
May be required before issuing writ of <i>habeas corpus</i>	404
Supersedeas on appeal, to suspend judgment	349
bond, on appeal to Court of Appeals, page 675.	

	SECTION.
Breach of peace—	
Jurisdiction of justice's courts in	18
Burglary—	
May be joined with robbery in indictment	127
Change of venue—	
	PAGE.
Adjacent or most convenient county	575, 576
Affidavits, requisites of	576
Application by Commonwealth, grounds	575
costs of removal paid by county, one application or change only	578
petition and notice	576
Application by defendant, grounds, one application or change only	578
petition, affidavits, notice	576
City judge, change to justice	579
Clerk's duty in making transfer, 577,	579
Convenient county, change to	575
Costs of transfer, how paid, 577, 578,	579
County judges, change to justice	579
Justice, change to another justice,	579
Mileage of person making transfer,	577
Papers transmitted, originals	577
copies when retained	577
originals retained, when	577
Police judge, change to justice	579
Preparation for trial	577
Proceedings, when defendant in custody	577, 578
when defendant on bail	577, 578
Recognizances of witnesses	577, 579
Remanded, when case to be	578
costs of transfer, how paid	579
motion for, who to make	578
original papers and transcript transferred	579
removal of defendant	578
witnesses recognized	579
Removal from county in state of lawlessness	576
expenses paid by county	578
when costs to be paid by county,	578
Removal of defendant when in custody	577, 578
when on bail	577, 578
Transfer made by clerk	577, 579
mileage	577, 579
Capias pro fine—	
Form of, from circuit court, page 677.	
from justices' court, page 677.	
Challenge—	
Actual bias defined	209

Challenge—Continued.

SECTION.

Challenge of one defendant challenge of all	198
to be tried by the court	212
Commonwealth to make challenge first	215
Defined	197
Either party may challenge for cause	205
Exemption from service as juror not ground of	211
Grounds of, challenge to panel . . .	199
of general challenge	207
of particular challenge	208
Implied bias, what constitutes . .	210
Juror may be examined on challenge	213
May be general or particular . . .	206
Must be before juror sworn in chief, unless by leave	202
Number of peremptory, by defendant	208
of peremptory, by Commonwealth	204
Order in which different kinds to be made	216
Proceedings if challenge to panel sustained	200
To juror is peremptory or for cause	201
Witness may be examined on challenge	214

Circuit courts—

Appellate jurisdiction of	362, 368
of appeals from county judge, page 399.	
amendment to	25
Bond to keep the peace to be returned to	386
Change of venue in. See CHANGE OF VENUE.	
Grand jury to give locality of offense	16
Indictment gives jurisdiction of all degrees of offense	14
Judge of, may issue writ of <i>habeas corpus</i>	399
Jurisdiction of, appellate	362, 368
of appeals from county judge, amendment to	25
original	13
indictment gives, of all degrees of offense and included offenses	14
local, of	18
either county has, of offenses over river bounding them . .	20
of offense committed in part in different counties	21
of offense of importing property into several	22
of kidnaping or imprisonment continued in several	23

Circuit courts—Continued.

SECTION.

May transfer to city or police courts cases	16
restrain inferior courts by writ of prohibition	25
Offense, jurisdiction of, if committed in part, in different counties	21
if committed on river bounding counties	20
by importing property, if it be imported into different counties	22
committed in part in different counties to be tried where . .	24
Security to keep the peace, may be required by	385
Special judges of, page 569.	

City courts—

See POLICE AND CITY COURTS.

Civil action—

Not to be affected by judgment under writ of <i>habeas corpus</i> .	428.
---	------

Civil Code—

Appeals in penal action regulated by	355
Bill of exceptions regulated by . .	282
Continuances regulated by, with exceptions	189
Proceeding in penal actions, regulated by	11
Summoning and coercing attendance of witnesses regulated by	151, 329

Clerks—

Appeal bonds, taken and approved by	349
on appeal to Circuit Court taken and approved by	364
Bail may be taken by, when	68
Causes of removal of	443
Circuit clerk to deliver papers to clerk of inferior court on transfer	15
Clerk or deputy not to be taken as bail	80
Court of Appeals may remove from office	13
Jury to be drawn by	191, 192
May take bail, when	68
Of police court, to issue summons upon information on oath . .	810
to issue subpoenas	815
Of Senate, shall issue summons on impeachment	484
shall issue process for production of evidence on impeachment .	436

Clerks—Continued.

SECTION.

Provisions as to clerk of police court apply to judge acting as clerk	820
Removal of, causes of	443
may be removed upon information	442
clerk of Court of Appeals to issue summons on information against	444
to issue process for production of evidence	445
Subpoenas, for grand jury issued by, in trial court to be issued by on request	105
Upon trial of clerk of Court of Appeals, court may appoint clerk <i>pro tem</i>	450

Commitment—

For failure to give bond to keep the peace	384, 387
Form of order of for such failure, page 662.	
of order of commitment for trial, page 662.	
How order executed	67
Order of, must be written, and fix amount of bail	67

Committee—

Appointed to prosecute impeachment	458
--	-----

Commonwealth—

Appeal by, in misdemeanors	350
by to Court of Appeals in felonies, by, does not suspend proceedings in case	387
by, not allowed to circuit court, Evidence for, when to be offered .	385
Has no right of appeal to circuit court	363
Must challenge juror before defendant	221
Number of peremptory challenges by	363
	215
	204

Confession—

Out of court, must be corroborated, .	240
---------------------------------------	-----

Constable—

Bail may be taken by	28
Is a peace officer, and may execute warrant of arrest	26

Construction—

Of words used in indictment	187
-------------------------------------	-----

Continuance—

SECTION.

Affidavit, of what absent witness would prove	189
when admitted as true or continuance granted	189
Examining court may continue two days	54
if bail has been given, may extend time	59
In city or police courts	316
Of trial of information in Court of Appeals	446
Regulated by Civil Code	189
Trial may be postponed for cause .	188

Conviction—

Bars another prosecution for same offense	176
prosecution for all degrees of offense	177
Judgment of, to be reversed for substantial error	340
how rendered on two or more convictions	288
Of offense not higher than charged, or of any included	262
of any offense charged, although higher degree of offense proven	265
Not warranted by confession, unless corroborated	240
to be had on testimony of accomplice	241

Coroner—

Is peace officer, and may execute warrants of arrest	26
When he may take bail	84

Corroboration—

Instruction to acquit unless there be, Of confession out of court, required to convict	242
testimony of accomplice required to convict	240
What corroboration sufficient	241
	241

Costs—

Bond for costs on appeal to circuit court	364
form of bond, page 676.	
Defendant, taxed against on affirmation	876
taxed against if he fail in Court of Appeals	861
How regulated on appeals to circuit court	866
Judgment in misdemeanor case to include	291
May be adjudged on trial of writ of <i>habeas corpus</i>	420

	SECTION.		SECTION.
Costs—Continued.		Court—Continued.	
On trial of information against clerk	448	Process, on finding of indictment to be ordered by	141
Prosecutor of impeachment liable for	441	Special judge of, page 569.	
Security for costs of prosecutor of clerk	447	See <i>Court of Appeals</i> .	
Unsuccessful party in impeachment trial liable for	440, 441	<i>Circuit court.</i>	
		<i>Examining court.</i>	
County—		<i>Justices' courts.</i>	
Jurisdiction, extends to river bounding	20	<i>Mayors' courts.</i>	
Offense committed in several, prosecuted in either	21	<i>Military courts.</i>	
of importing property, if it be imported into several	22	<i>Police or city courts.</i>	
of kidnaping or unlawful imprisonment, if continued	23		
County attorney—		Court of Appeals—	
Examining court, to notify	51	Clerks of courts, may remove	442
When writ of <i>habeas corpus</i> to be prosecuted by	424	Continuances may be granted in trial of	446
		Jurisdiction of, extends over whole State	13, 17
County judge—		of appeals in misdemeanors, when it has	347
Criminal jurisdiction same as justice	18	of appeals in felonies	334
Examining court, held by in certain cases	71	original, for removal of clerks	13
Is a magistrate and may issue warrant of arrest	26	May compel prosecutor of clerk to secure costs	447
May take bail after commitment	68	compel obedience to process for production of evidence on trial of clerk	445
Misdemeanors may be tried by, page 899.		On trial of clerk of Court of Appeals may appoint clerk <i>pro tem</i>	450
When he may issue writ of <i>habeas corpus</i>	899		
he may try writ of <i>habeas corpus</i>	416	Crime—	
Court—		County to be prosecuted in	21
Always open while jury deliberating	253	Criminal Code—	
Bail, when to be taken by court in which defendant held to appear	68	Application of	2
to be fixed by, on ordering bench warrant	141	Regulates proceedings after January 1, 1877	1
Bench warrant, only to issue by order of	140	Repeals all laws within its purview,	3
may be ordered to issue by, although defendant on bail	141		
may be ordered to issue by, on any indictment	149	Day—	
Duty of court to advise grand jury, Jurors, to try challenges of	109, 212	Writ of <i>habeas corpus</i> may issue on any day	427
Jury to be admonished by, at each adjournment	246		
Law, all questions of to be decided by	235	Damages—	
May permit plea of guilty to be withdrawn before judgment	174	On affirmation of misdemeanor case by Court of Appeals	356
		Death penalty—	
		Governor to issue warrant upon affirmation	346
		when to fix day of execution	297
		Insanity of defendant suspends	296
		Judgment must fix day of execution	290
		copy of, authorizes execution	293
		how to be executed	294
		<i>Form of, page 678.</i>	

	SECTION.		SECTION.
Death penalty—Continued.		Defendant—Continued.	
Judgment affirmed, governor to issue death warrant	846	Felony, to be present during trial for	188
No appeal nor reversal after death of defendant	842	may remain on bail until case submitted	188
Only governor or sheriff can suspend execution	296	to remain in custody during trial	229
Pregnancy of defendant suspends	296	Grand jury refusing to indict, to be discharged	116
Sheriff may suspend execution, when	296	Guilty, plea of, to be entered in person	178
Suspension of	296	<i>Habeas corpus</i> , writ of, how served if defendant conceal himself, defendant to be notified to what officer writ has been returned,	407
Death warrant—		Higher offense proven than charged may be held to answer	282
Governor to issue, on affirmation of judgment	846	In peace warrant to be discharged if prosecutor fail to appear	889
if sentence of death not executed at time fixed	97	or if no ground of apprehension appear	890
Defendant—		Indictment not found at second term to be discharged	117
Appeal by, only allowed from final judgment	885	Insane or pregnant, not to be executed	296
to Court of Appeals, how taken	886	trial of sanity of	166
if in penitentiary, to remain pending	848	to be sent to lunatic asylum if insane	166
to be removed, if judgment reversed	844	Joint defendants in felony entitled to separate trial	287
again convicted to have credit for former confinement	845	are competent witnesses	284
Arraignment of, in felonies	155	Judgment, detention after arrest of, must be present at, in felony case, information to before rendering	279
may be dispensed with	155	causes he may show against	287
Arrested for misdemeanor may give bail	28	Jury, statement of case to	222
to be tried forthwith	48	in police or city court, when he may demand	819
on bench warrant to be taken before sheriff to give bail	144	in justices' court, when he may demand	881
Bail may surrender defendant	86	right of to have polled	267
may arrest or have him arrested	87	may return verdict as to all or any of several defendants	266
before conviction, when entitled to	74	May object to magistrate in examining court	52
after conviction not allowed	75	surrender himself in discharge of bail	86
during adjournment of examining court	55	dispense with arraignment	155
application for, how made	81	plead if demurrer overruled	171
may remain on, in trial for felony until case submitted	188	remain on bail during felony	188
Challenge of one is challenge of all	198	during trial for misdemeanor	184
number of peremptory allowed to,	208	have jury polled	267
Charged with offense in another county, to be sent to such county	46	be convicted of lower degree than charged	262
Commitment of, if indicted while on bail for offense not ballable	145	Must plead if motion to set aside indictment overruled	161
Duty of, when bail-bond defective as to time for appearance	85	Offense not proven to be discharged	65
Entitled to benefit of disagreement between justices in felonies	71	Pleadings allowed on behalf of	162
on surrender, to return of money deposited in lieu of bail	88	Plea of guilty to be entered in person	178
Error in name of, in indictment may be corrected	125	Reasonable doubt as to guilt entitles to acquittal	288
Evidence, when he must offer	228	Statement of case by, or attorney to jury	222
may testify in his own behalf	228		

	SECTION.		SECTION.
Defendant—Continued.		Deposit in lieu of bail—Continued.	
Testimony of, in his own behalf	228	Court may apply in discharge of fine	92
Trial of sanity of	156	may discharge forfeiture	96
to be sent to asylum if insane	156	Defendant may deposit amount and be discharged	89
Trial, to be held, for if offense proven	66	deposit by, after bail discharges bail	90
if held for may have witnesses recognized	69	Deposit, entry of to be made on minutes of examining court	56
must move to set aside indict- ment or plead	157	to be returned if defendant ap- pear	56
may be again arrested after giv- ing bail	99	magistrate must fix amount of	55
when entitled to bail after such arrest	100	with peace officer pending ad- journment of examining court,	55
To be discharged if indictment set aside, unless next jury ind- dict	160	how forfeited	93
discharged if grand jury refuse to indict	115	peace officer responsible for	57
have opportunity to procure coun- sel	51	how amount determined	60
		held subject to order of court	91
		returned on surrender of defend- ant	89
		paid to trustee of jury fund if defendant does not appear	56
		returned on final dismissal by grand jury	115
Degrees of offense—		Disposition of after forfeiture	97
Conviction of offense charged, al- though higher proven	265	Entry of, on minutes of examining court	56
of any degree not higher than charged	262	form of entry, page 658.	
or acquittal bars further prosecu- tion	177	Form of entry of forfeiture, page 658.	
Indictment gives jurisdiction of all degrees	14	of entry of deposit on minutes of examining court, page 658.	
Proceedings if higher degree proven,	232	of notice to attorney for Com- monwealth of surrender,	
Reasonable doubt as to degree, con- viction should be of lower	289	page 659.	
What are degrees of the same of- fense	268	of certificate of trustee of jury fund of amount deposited, page 659.	
		Magistrate must fix amount of	55
Demurrer—		May be made with peace officer pend- ing adjournment of examin- ing court	55
Form of entry of, page 671.		Money deposited returned on sur- render of defendant	89
of entry of, on record	164	deposited and forfeited to be cred- ited to jury fund	97
Grounds of demurrer	165	Peace officer responsible for	57
Is allowed on behalf of defendant	162	Return of upon surrender of defend- ant	88
Judgment on is final, when	169	Trustee of jury fund to give certi- ficate of amount of	89
if sustained on other grounds case to be resubmitted	170	form of certificate, page 659.	
Jurisdiction to	166	deposit paid to, on forfeiture	56
proceedings if sustained	167	held by, subject to order of court	91
May be oral, to be entered on rec- ord	168		
No joinder in necessary	179	Depositions—	
Overruled, defendant may plead	171	Defendant may take	153
Proceedings if sustained for want of jurisdiction	166	Mode of taking them	153
Deposit in lieu of bail—		Dismissal—	
Bail discharged, if deposit made	90	Of indictment does not bar further prosecution	243
in lieu of	55, 89		
direction concerning	56		
peace officer responsible for	57		
amount to be deposited	60		

	SECTION.		SECTION.
Dismissal—Continued.		Evidence—Continued.	
Offenses misjoined dismissal as to one	168	Jury may have view of place . . .	286
When dismissal will not bar further prosecution	178	to be accompanied by accused and judge	286
Disorderly person—		may hear evidence after retiring . .	249
How to be dealt with	396, 398	Minutes of examining court, not evidence	64
Peace officers to arrest	395	Non-resident witness for Commonwealth	151
Docket—		Papers in evidence to be taken by jury	248
Case to stand for trial on day it is docketed	187	Rebutting evidence	224
How to be made out	186	Senate to coerce production of, on impeachment	436
Documents—		clerk of, to issue process for, on impeachment	435
See WRITTEN INSTRUMENTS.		Subpœna <i>duces tecum</i>	152
Door—		Testimony of accomplice must be corroborated	241
Breaking to make arrest	40	if corroboration wanting, jury to be instructed to acquit . . .	242
Doubt—reasonable—		of defendant in his own behalf . .	228
Entitles defendant to acquittal . .	238	as to disputed handwriting, see sec. 604, Civil Code.	
to conviction for lowest degree . .	239	Witnesses, how attendance of secured	151
Drunken person—		non-resident, how Commonwealth may secure	151
How to be dealt with	396, 398	subpœna for witnesses	151
To be arrested by peace officers . .	394	What evidence grand jury shall receive	107
Embezzlement—		When Commonwealth to offer . . .	221
Joinder with larceny in indictment, .	127	defendant to offer	223
What sufficient charge of	135	Examining court—	
Evidence—		Adjournment not exceeding two days	54
Accomplice, testimony of must be corroborated	241	defendant may be bailed during . .	55
corroboration wanting, court to instruct jury to acquit . . .	242	Amendment to	71
Court of Appeals to coerce production of, on trial of clerk . . .	445	Bail during adjournment	55
clerk of to issue process for production of, on trial of clerk . .	445	money deposited in lieu of	55
Commonwealth, evidence for, when to be offered	221	if sufficient, court must take it . .	67
Confession out of court must be corroborated	240	Commitment, order of	76
Court may compel production of documents and other things to be used as	152	Consists of one magistrate	49, 71
Defendant may testify in his own behalf	223	Court must issue subpœna for witnesses	61
when evidence for to be offered . .	223	may adjourn for two days	54
Depositions for defendant	158	defendant may object to	52
Grand jury, what evidence they shall receive	107	proceedings when objection made, to consist of county judge in homicide	71
Handwriting, evidence of disputed. See sec. 604, Civil Code.		County attorney to be notified . . .	51
Jury may hear evidence after retiring	249	County judge to hold in homicide .	71
		Defendant to have opportunity to procure counsel	51
		may object to magistrate presiding	52
		to be committed or give bail during adjournment	55
		falling to appear, bond to be forfeited	58
		discharged if offense not proven . .	65
		if offense proven, to be held . . .	66

	SECTION.		SECTION.
Examining court—Continued.		Execution—	
Defendant if other than that charged proven to be held . . .	66	Appeal to circuit court, how suspended on	864, 865
time for appearance may be extended	59	Bail, execution on judgment against,	802
Deposit in lieu of bail	55	Copy of judgment authorizes execution of	293
entry of to be made on minutes	56	Death warrant when issued by governor	346
form of entry of, page 658.		Execution, how suspended on appeal in misdemeanor	349
if defendant appear, to be returned	56	on judgment for fine	301
if he do not appear, to be paid to trustee of jury fund	56	on judgment against bail	302
Entry of deposit in lieu of bail to be made on minutes	56	on judgment for abatement of nuisance	308
form of, page 668.		sheriff to make written return on, form of, for fine, page 677.	300
form of entry of forfeiture, page 658.		Fine, execution on judgment for	301
Fees of magistrate	71	period of confinement for	304
Felony case	71	Form of execution for fine, page 677.	
ball allowed during trial	55	Governor to issue death warrant on affirmance	346
Form of entry, of deposit, page 658.		to fix day for executing death sentence when	297
of entry of forfeiture, page 658.		How judgment of death to be executed	294
of minutes of examining court, page 660.		suspended on account of insanity or pregnancy	296
of order of commitment, page 661.		Imprisonment, how judgment of executed	298
Homicide, county judge to preside, Magistrate, may be objected to	71	Judgment of death, must fix day of execution	290
proceeding when objection made, in such case magistrate to retire	52	copy of authorizes execution	293
to deliver minutes to clerk of court	52	how and when, to be executed	294
to take bail	70	suspended on account of insanity or pregnancy	296
how to proceed in felony	67	what officers may suspend execution of	294
May adjourn two days	71	Nuisance, execution of judgment for abatement of	303
Minutes of	64	Period of confinement for fine	304
to be delivered to clerk of court	64	Replevin of	305
Offense not proven, defendant discharged	70	Sheriff to make written return of	300
proven to be held	65	what officers may suspend execution of death sentence	295
other than that charged proven, to be held	66	Supersedeas bond necessary to suspend execution on appeal in misdemeanor	349
Order of commitment	66		
Proceedings if defendant charged with felony	67	Exemption—	
Spectators may be excluded	71	From service as juror not a ground of challenge	211
Testimony, substance of to be stated in minutes	68		
Trustee of jury fund, money deposited and forfeited paid to,	64	Fact—	
Witness to be recognized	56	Judicially noticed need not be alleged	130
may be separated	69		
subpoenas for, to be issued	62	Fee—	
defendant may testify in person	61	Non-resident witness	151
continuance because of absent	61	Of examining court	71
Writ of <i>habeas corpus</i> , if bail refused	223	witnesses in impeachment case	437
	426		
Exception—			
See BILL OF EXCEPTIONS.			
Must be noted of record	882		
What decisions are subject to exception	880		
What are not	881		

Fee—Continued.

Taxed for attorney if Commonwealth succeeds on appeal . . .	354
taxed for, in circuit court, if Commonwealth succeeds . . .	367

Felony—

See APPEALS TO COURT OF APPEALS.

Appeal may be taken from judgment in	384
County judge to hold examining trial for, when	71
Defendant may remain on bail during examining trial for, amendment to	55
must be present during trial for, may remain on bail until case submitted	183
to remain in custody during trial for	229
must be present when judgment rendered	285
Definition of felonies	6
Examining trial for	71
Joint defendants in, entitled to separate trials	287
Judgment in, at what time to be rendered	283
defendant to be present	285
Warrant not to issue for, without affidavit	81
Separate trial of joint defendants	287

Fine—

Confinement for, to be one day for each \$2	304
Form of judgment for, page 673.	
Judgment may direct imprisonment for	289
May be recovered by penal action	11
Replevy of judgment for	305

Foreman—

Of grand jury may administer oath to witnesses	106
to sign indorsement on indictment	119

Forfeiture—

Bail-bond given during examination	58
or money, deposited in lieu of bail	98
Court may remit before judgment	97
may discharge, if defendant appear	96
Form of summons on, page 652.	
Proceedings upon	94

Forgery—

Sufficiency of indictment for	133
---	-----

(49)

SECTION.

Former acquittal or conviction—

Bars prosecution for same offense,	176, 177
Form of plea of	164
May be pleaded with, or without, plea of not guilty	172
Plea of, deemed controverted without reply	179

SECTION.

Forms—

<i>Appeals—</i>	PAGE.
Forms in, to Court of Appeals, 674, in to circuit court	675 676

Attachment—

For witness	655
-----------------------	-----

Bail—

Bail bonds	656, 657
Deposit in lieu of	658
Examination of on oath	658
Indorsement on warrant as to, 658,	654
Recognizance of	658
Summons on forfeited bail-bond	652

Bench warrant—

Form of	654
Indorsement on, as to bail	654
Order of	671

Bill of exceptions—

Form of and rules for preparing,	645, 646
--	----------

Bonds—

Appeal bond, to circuit court	676
Bail-bonds	656, 657
Bond on application for writ of <i>habeas corpus</i>	678
Supersedeas bond, on appeal to Court of Appeals	675
on appeal to circuit court	676
To keep the peace, or for good behavior	661, 662

Capias pro fine—

Form of	677
-------------------	-----

Certificate—

Of deposit given by trustee of jury fund	659
appeal in felony	674
appeal to circuit court	677

Deposit in lieu of bail—

Forms concerning	658
----------------------------	-----

Demurrer—

Entry of, on record	671
-------------------------------	-----

Examining court—

Forms of proceedings in	660
-----------------------------------	-----

	PAGE.		PAGE.
Forms—Continued.		Forms—Continued.	
<i>Execution—</i>		<i>Supersedeas—</i>	
For fine	677	Bond on appeal to Court of Appeals, 675 to circuit court	676
<i>Forfeiture—</i>		<i>Surrender of defendant—</i>	
Entry in minutes of examining court of forfeiture of deposit, 658		Acknowledgment of, given by jailer	659
<i>Habeas corpus—</i>		Indorsement by bail to secure arrest of defendant	659
Forms under writ of	678	<i>Warrant of arrest—</i>	
<i>Indictment—</i>		Forms of	653
Forms of	668, 670	Indorsement on, as to bail	653
<i>Indorsement—</i>		Good behavior—	
By bail to secure arrest of de- fendant	659	See SECURITY TO KEEP THE PEACE	382
Changing time for return to writ of <i>habeas corpus</i>	678	Governor—	
On warrant, as to bail	654	May suspend execution of judgment of death	296
<i>Judgment—</i>		Must issue death warrant upon affirmance	346
Forms of judgment on conviction, 673		if sentence not executed on day fixed	297
<i>Minutes of examining court—</i>		Shall send military aid, when	374
Form of	660	Grand juror—	
<i>Notice—</i>		Concurrence of nine necessary	119
Of change of time for return to writ of <i>habeas corpus</i>	678	Duty to disclose offenses known	104
To attorney of motion for return of deposit in lieu of bail	659	Must keep secret proceedings	112
<i>Orders of court—</i>		Not responsible for acts or votes, ex- cept perjury	114
For bench warrant	671	When may be required to disclose testimony	113
summons on indictment	671	Grand jury—	
If offense committed out of jurisdic- tion of court	672	Attorney for Commonwealth may examine witnesses before	109
committed out of State	673	to advise, when requested	109
Judgments on conviction	673	Clerk to issue subpoenas for	105
On ascertaining defendant's true name	672	Concurrence of nine jurors neces- sary	119
Order noting prayer for appeal	674	Court to advise	109
Setting aside indictment and resub- mitting case	672	Defendant discharged unless next grand jury indict	160
<i>Pleadings of defendant—</i>		to be discharged at second term	117
Forms for entry of, on record	671	Demurrer sustained, case resubmit- ted	170
<i>Recognizance—</i>		Duty of	102
Of bail	658	grand juror to disclose all offenses known to him	104
witnesses in examining court	656	Entitled to free access to all prisons and records	103
<i>Security to keep the peace or for good behavior—</i>		Error in formation of, ground for setting aside indictment	158
Forms for	661, 662	Evidence they shall receive	107
<i>Subpoena—</i>		Foreman may administer oath to witness	106
Forms of	654, 655		
<i>Summons—</i>			
Forms of	652		

Grand jury—Continued.	SECTION.
Form of order setting aside indictment, and resubmitting, page 672.	
Formation of	101
How witnesses compelled to testify before	108
Indictment, error in formation of jury for setting aside	158
presence of unauthorized person with grand jury ground for setting aside	158
not found at second term, defendant discharged	117
concurrence of nine jurors necessary	119
manner of presenting to court . .	121
In what cases they should indict .	111
Juror not responsible except perjury, may be compelled to disclose testimony	113
Manner of presenting indictment in court	121
May be required to give locality of offense, when	16
have advice of court and Commonwealth's attorney	109
Nine jurors may find	119
Oath to witnesses	106
Papers returned by magistrate to be laid before	115
Police or city court may impanel . .	307
Proceedings must be kept secret . .	112
Resubmission of case to	116, 116
Selection of	101
Summoned and impaneled as prescribed in Ky. Stat.	101
What evidence they shall receive .	107
Who may be present with	110
When court may order case submitted to another grand jury . .	116
if indictment set aside case to be resubmitted	159
defendant to be discharged . . .	160
Witness compelled to testify before,	108
Guilty—	
Plea of, may be withdrawn	174
can only be entered in person . .	178
Habeas corpus—	
Affidavits may be read as evidence,	413
Ball, before whom to be tried if examining court refuse	426
Before whom writ returnable . . .	409
whom writ to be tried if examining court refuse bail	426
Body of person detained to be produced except	411
when need not be produced . . .	412
Bond may be required before issuing writ	404
Form of, page 678.	

Habeas corpus—Continued.	SECTION.
By whom, and for what causes, issued	899
by whom and how served	406
Contents of writ	402
to whom directed	402
Defendant to be notified to what officer returned	417
Enforcing judgment	414
Form of writ, page 678.	
of bond that may be required before issual, page 678.	
Form of indorsement, page 678.	
of notice if time for return changed, page 678.	
How issue formed	419
objection made to officer presiding	418
writ served if defendant conceal himself	407
Judgment, how enforced	414
not to prevent issuing of another writ	429
Notice to be given if time for return changed	408
form of notice, page 678.	
Officer related or interested not to preside	415
Papers to be returned to proper court	421
Penalty for refusing to issue . . .	401
for refusing obedience to	409
Person released under not to be imprisoned except	422
Proceedings if person in custody appear to be guilty of public offense	423
under writ not to affect civil suit, upon refusal to obey writ	409
Powers of private person executing, Prisoner, in what cases may be removed from jail or custody . .	425
Process for securing attendance of witnesses	414
Return, when and how time for may be changed	408
form of indorsement, changing time of, page 678.	
to what officer to be returned . .	416
of by person serving it	408
before whom to be made returnable	409
Service of, by whom and how made, how served if defendant conceal himself	407
Trial and judgment under writ . .	420
before whom tried if examining court refuse bail	426
Writ may be issued on any day . .	427
may issue against religious or other association	424
powers of private person executing	427

	SECTION.		SECTION.
Habeas corpus—Continued.		Included offenses—	
Writ, proceedings under not to affect civil suit	429	Conviction may be of any offense included	262
person released under, not to be imprisoned except	422	Indictment gives circuit court jurisdiction of	14
by whom and for what causes issued	399	Offenses included in one charge	264
penalty for refusing to issue	401		
contents of	402	Indictment—	
bond may be required before issued	404	Allegations as to time	129
to what officer it shall be returned	416	as to person injured or owner of property	128
trial and judgment under	420	Attorney for Commonwealth may dismiss	243
When and where to be made returnable	402	Bench warrant upon	188
officer granting may order body of person detained to be taken	405	Bank notes, for larceny of, what sufficient description	185
		Certainty in	124
		Clerk to file	121
Handwriting—		Concurrence of nine grand jurors necessary	119
Comparison of disputed, see act —, sec. 606, Civil Code.		Construction of words in	187
		Court to order process on	141
Having counterfeit money in possession—		Defendant may move to set aside	157
And passing money may be joined in indictment	127	must plead if motion overruled	161
		to be discharged unless next grand jury indict	160
Importing property—		error in name corrected	125
Prosecuted in any county into which imported	22	indicted for offense not ballable to be arrested	145
Trial where defendant first arrested or indicted	24	Definition of	118
		Demurrer, when judgment on final, grounds of, to indictment	165
Impeachment—		Directness in	124
Articles of	481	Dismissal of, when not bar of one offense, if misjoinder	178
what must state	482	Embezzlement, allegations charging, Error in name of defendant corrected	185
Committee to prosecute	433	Facts judicially noticed not to be stated	125
Costs if there be no prosecutor to go against unsuccessful party	441	Form of	130
Defined	440	of summons on	123
How production of evidence coerced, Oath to be taken by senators	436	of order setting aside and resubmitting, page 672.	146
Process of production of testimony, Privileges and pay of witnesses	435	Forms of, page 663.	
Senate has jurisdiction of	437	Found in one county, when jurisdiction of other counties excluded	24
Summons on, how issued and served, What absence prevents senator from voting	13	Gives circuit court jurisdiction of all degrees	14
	484	Grand jury, when should find	111
	489	Grounds on which set aside	168
Imprisonment—		of demurrer to	165
For fine to be one day for each \$2, Form of judgment for, page 673. Judgment of, how executed	304	How presented	121
may direct imprisonment for fine, of imprisonment how to be executed	298	In what cases grand jury should find	111
Unlawful may be prosecuted where it is begun or continued	23	Joinder of offenses in	127
to be tried where defendant first indicted or arrested	24	Judgment, how pleaded in	181
		Jurisdictional facts to be stated	131
		Larceny for, allegations of	185
		Libel, what sufficient indictment for	132
		Misjoinder dismissal as to one	168

Indictment—Continued.

SECTION.

Money, what sufficient description of	135
Must charge but one offense, except as provided in sec. 127	126
Name of defendant may be corrected	125
Names of witnesses to be written on	120
Need not pursue words of statute	136
Nine jurors may find	119
Offenses which may be joined in more than one may be dismissed as to one	168
what are indictable and what are not	9
not bailable, defendant to be arrested	145
Perjury or subornation of, what sufficient for	184
Pleading of defendant to	161
Police courts in	806
Presenting to court	121
Process upon	189
Proceedings when set aside	159
upon quashal of	238
Presumptions of law and fact not to be stated	180
Reading of to jury	219
Resubmission to jury	233
Statement as to person injured	128
as to owner of property	128
Statute, words of, need not be pursued in	186
Time, allegation as to generally immaterial	129
Summons on, form of	146
To be read to jury	219
What necessary in pleading judgment	181
offenses are indictable, and what are not	9
When not necessary in police or city court	306
court should quash	233
judgment on demurrer final	169
Witnesses' names to be placed on	120
Words, construction of	137
Written instrument, description of,	131

Indorsement—

Bail by to procure arrest of defendant	87
form of indorsement by, page 659.	
Changing time for return to writ of <i>habeas corpus</i>	403
form of such indorsement, page 678.	
Warrant on fixing amount of bail	28
bench warrant as to bail	143
form of, on warrant as to bail, page 654.	

Insane person—

How to be dealt with	896, 897
To be arrested by peace officer, 12,	894

Insanity—

SECTION.

See SANITY.	
Arrest of insane person	12, 394
proceedings upon	396, 397
Postponement of proceedings to try question of	156
Reason why judgment should not be pronounced	287
Suspends execution of judgment of death	296
Verdict and proceedings on plea of,	268

Instructions—

Argument concerning	226
jury to withdraw during	226
Bill of exceptions must show all	341
Corroboration not sufficient, defendant acquitted	242
Court shall give	225
shall instruct jury to acquit, if corroboration required not produced	242
Instructions given after jury retire,	249
Jury to withdraw during argument on	226
Reasonable doubt as to	238
Written to be	225

Issues—

By whom issues of law and fact tried	180
City or police courts, trial in	319
Fact of, when arises	182
Formed, on trial under writ of <i>habeas corpus</i>	419
Justices' court, by whom tried in	331
Law of, when arises	181
Oath of jury to try	217

Jailer—

Commitment to of person arrested	67
May execute warrant of arrest	26
Must detain defendant surrendered, as on commitment	86
give acknowledgment of surrender	86

Joinder—

In demurrer not necessary	179
Offenses that may be joined in indictment	127

Joint defendants—

Testimony of	234
------------------------	-----

Judge—

See COUNTY JUDGE.	
City or police court of, may fix terms	308
may issue warrant of arrest	312

Judge—Continued.

County judge, jurisdiction of . . .	13
in misdemeanors, page 399.	
<i>Habeas corpus</i> , judges who may issue writ . . .	399
writ to be returnable before judge of one of these courts . . .	400
May call out military to suppress riot . . .	379
Provisions as to clerk apply to judge acting as . . .	320
Trial court, of not to be taken as bail . . .	80

Judgment—

See ARREST OF JUDGMENT.

Acquittal of, in misdemeanor when not reversed . . .	352
in felony not to be reversed . . .	339
Arrest of . . .	276, 277
motion for . . .	275
proceedings upon . . .	278, 279
At what time to be rendered . . .	283
Conviction of, in felony reversed for error . . .	340
in misdemeanor reversed for error, . . .	353
Copy of, authorizes execution . . .	293
Death of, to fix day of execution . . .	290
how and when judgment executed . . .	294
Defendant must be present when pronounced in felony . . .	285
causes may show against . . .	287
refusing to plead, final judgment to be entered . . .	171
credit for former confinement upon conviction after reversal, . . .	345
Demurrer, in what cases judgment on final . . .	169
Duty of court, before rendering . . .	286
Felony, defendant to be present when pronounced in . . .	285
when may be rendered . . .	283
Final to be entered if defendant refuse to plead . . .	171
Fine, may direct imprisonment for, . . .	289
Form of judgment of death, page 673.	
of judgment of imprisonment, page 673.	
of judgment for fine and imprisonment, page 673.	
of judgment of removal from office, page 674.	
<i>Habeas corpus</i> , on trial of . . .	420
not to affect civil action for same cause . . .	428
not to prevent issuing another writ for same cause . . .	429
How rendered on two or more convictions . . .	288

Judgment—Continued.

In what cases judgment on demurrer final . . .	169
misdemeanors, shall include costs, . . .	291
Insanity, cause against . . .	287
Malefascance in office, nature of judgment for . . .	292
Misdemeanor in, shall include costs, . . .	291
of acquittal in, not to be reversed when . . .	352
of conviction in, to be reversed for error . . .	353
judgment, when may be rendered . . .	283
Misfeasance in . . .	292
Nature of, for malefascance in office, . . .	292
Of acquittal in misdemeanor when not to be reversed . . .	352
conviction in misdemeanor to be reversed for substantial error, . . .	353
acquittal, in felony not to be reversed . . .	339
On trial under writ of <i>habeas corpus</i> , . . .	420
how such judgment enforced . . .	414
not to affect civil action for same cause . . .	428
not to prevent issuing of another writ for same cause . . .	429
Penalty to be fixed by . . .	284
Suspended by appeal . . .	336
Time to be rendered . . .	283
Two or more convictions . . .	288
What necessary in pleading . . .	181

Jurisdiction—

Appellate, of circuit court . . .	362, 363
of circuit court from county judge, page 399.	
of Court of Appeals in felonies . . .	334
of Court of Appeals in misdemeanors . . .	347
Breach of the peace, of justices' courts . . .	13
Circuit court, local of . . .	18
of offense committed on river . . .	20
of offense of importing property, of offense committed in part in several counties . . .	21
City and police courts, local of . . .	19
See JURISDICTION, page 551.	
County judge, page 399.	
Court of Appeals extends over whole State . . .	17
Courts generally . . .	13
Demurrer to . . .	166
Importing property . . .	22
Indictment gives, of all degrees of offense . . .	14
Judge of county court . . .	13
in misdemeanors, page 399.	
Justices' courts, local of . . .	18
see jurisdiction, page 550.	
Libel, amendment to . . .	21

Jurisdiction—Continued.	
Local, of circuit and justices' courts, of city and police courts	18
Offense of importing property	22
committed in part in several counties	21
to be tried where defendant first indicted or arrested	24
Over river bounding two counties, Police courts' jurisdiction, page 551.	20
Proceedings if demurrer sustained for want of	166
if want of appear on trial	167
if want of appear on trial	230, 281
form of orders in such cases, page 672.	
Riots and routs, of justices' courts in	18
Senate of Kentucky	13, 17
State, proceedings when offense committed out of	281
Trial, proceedings when want of, appears on	167
Juror—	
Court may excuse sick juror	250
Juror may be examined to show verdict was by lot	272
May be examined on challenge	218
Proceeding if juror taken sick	251
Jury—	
See TRIAL AND VERDICT.	
Actual bias defined	209
Admonition by court to	246
Adjoining county from	194
Adjournment final, discharges	254
After completion of, court may permit sick juror to separate from others	251
Attorney for Commonwealth to state case to	220
Bias, actual, defined	209
implied, defined	210
Board for	247
Challenge may be to panel or individual juror	197
of one defendant is challenge of all	198
grounds of, to panel	199
proceedings when sustained to panel	200
of juror is peremptory or for cause	201
must be before juror sworn, unless by leave	202
number of peremptory by defendant	208
number of peremptory by Commonwealth	204
for cause may be by either party, may be general or particular	205
grounds of general	207

Jury—Continued.	
Challenge, particular, may be for actual or implied bias	208
exemption from service not ground of	211
court to try	212
juror may be examined on	218
other witnesses may be examined on	214
Commonwealth to challenge first, order in which must be made	216
clerk to draw jury of twelve	191
Court may appoint person other than sheriff to summons	198
to try challenge	212
may excuse sick juror	250
always open while jury deliberating	258
Defendant, jury impaneled to fix punishment if he refuse to plead	171
may demand jury in police, when, may demand jury in justices' court, when	819
challenge of one is challenge of all, number of peremptory challenges allowed to	881
statement of defense to jury by	198
Disagreement cause for discharge	252
Discharge of, allowed if juror take sick	251
without verdict, cause to be again tried	252
for what causes allowed generally, final adjournment discharges	251
Duty and oath of officer in charge of	254
Exemption from service not ground of challenge	245
Final adjournment discharges jury, Grounds of challenge to panel	211
of general challenge	254
How jurors selected and summoned, panel to be filled	199
How to be provided for	207
informed as to law or evidence after retiring	190
Implied bias defined	192
Indictment to be read to	247
In what cases to be kept together	249
justices' court, how summoned	210
Issues of fact to be tried by	219
Juror may be examined on challenge	244
Justices' court, how summoned in	882
when may be demanded in	180
Kept together, when	218
Lodging for	882
May be impaneled to fix punishment, return verdict as to all or any of several defendants	331
Mileage of	244
Oath of, to try issue	247
if there be no issue	171

	SECTION.		SECTION.
Jury—Continued.		Justices' courts—	
Panel, challenge to	197	Bail for good behavior in	825
Papers, etc., put in evidence to be taken by	248	Change of venue in, page 574.	
Pay and mileage of jurors	195	Defendant may be tried at once by, or case continued	828
Penalty to be fixed by, unless fixed by law	258	may be committed by, or dis- charged on bail	824
Place, view of where material fact occurred	286	Jurisdiction of 18,	18
how view conducted	286	see further, page 550.	
Polling the jury	267	Jury in, how summoned	882
Proceedings when challenge to panel sustained	200	when may be demanded	881
Selecting of 190,	191	Limitation of power to issue war- rant	827
Sick juror may be excused	250	May try defendant at once or con- tinue	828
may be permitted to separate from	251	May commit defendant or discharge him	824
Special bailiff to summons	198	Nature and form of summons and warrant	828
Summoning of	190	Pleadings may be oral in	830
special bailiff to summons	198	Provisions of Title VI. apply to	838
adjoining county from	194	Removal of prosecution to from cir- cuit court	15
To withdraw during argument on instructions	226	Summons and warrant, nature and form of	828
take papers put in evidence	248	to issue on knowledge or informa- tion of public offense	826
Verdict as to any or all of several defendants	266	Warrant and summons, nature and form of	828
View of place where material fact occurred by	286	to issue on knowledge or informa- tion of public offense	826
how conducted	286	When they shall require bail or bond for good behavior	825
When defendant may demand in police courts	819		
defendant may demand in justices' court	881		
Justices of the peace—		Kidnaping—	
See JUSTICES' COURTS.		County to be prosecuted in	23
Breach of the peace, trial of by	18	Tried where defendant first indicted or arrested	24
Change of venue from, page 574.			
Duty of, to suppress riot	875	Larceny—	
Examining court by, see amend- ment to	71	Of money, what sufficient descrip- tion of	185
<i>Habeas corpus</i> , writ of, when may be issued by	899	Offenses that may be joined with in indictment	127
How single justice to proceed in felony	71		
Is a magistrate and may issue war- rants of arrest	26	Law—	
Jurisdiction of	18	All questions of, to be decided by the court	235
extends over the county	18	Court to instruct jury as to law of the case	225
see further as to jurisdiction, page 550.		How issue of arises	181
May call out military to suppress riot	879	jury informed as to, after they re- tire	249
Military may be called out by, to suppress riot	879	Issues of, to be tried by court	180
Offenses exclusively within their jurisdiction not indictable	9	Jury, how informed as to after re- tirement	249
such offenses to be prosecuted by summons or warrant	10		
Warrant of arrest, when to be is- sued by	81	Libel—	
When they may issue writ of <i>habeas</i> <i>corpus</i>	899	Jurisdiction of, amendment to	21
		What sufficient charge of, in indict- ment	182

	SECTION.		SECTION.
Louisville City Court—		Magistrate—Continued.	
Laws relating to, not changed by Code	322	Examining court, may be held by	71
		to retire from on affidavit of defendant	52
		may be adjourned not exceeding two days	54
		See EXAMINING COURT.	
Magistrate—		Examination of witnesses to ascertain offender	82
Arrest, when he shall issue warrant of	81	of witnesses to ascertain if offense committed	82
warrant of, may be issued by	26	Felony in to notify county attorney, see amendment to	51
may order orally, if offense committed in his presence	88	penalty for issuing warrant without affidavit	81
Bail, if offense committed in another county	46	How to proceed when insane person brought before them	397
bond in such case to be transmitted by mail	47	to dispose of drunken or disorderly persons	398
on examination of charge to commit defendant or hold him to, to fix amount to be deposited in lieu of	49	amount to be deposited in lieu of bail determined	60
if offense proven defendant to be committed or admitted to	66	May issue warrants of arrest	26
amount of, fixed in order of commitment	67	summon and examine witnesses to ascertain if offense committed	32
must take, if sufficient be offered, committing, may take bail after commitment	67	order arrest orally if offense committed in his presence	88
Bond to keep the peace or for good behavior taken by	68	adjourn examination not exceeding two days	54
to be returned to clerk of circuit court	384	extend time for defendant's appearance	59
	386	exclude spectators on request of defendant	63
Change of venue from, page 574.		Minutes of examining trial to be delivered to clerk	70
County attorney to be notified in felonies	51	substance of testimony and names of witnesses to be entered on,	64
Committing, may take bail after commitment	68	Offense not proven, defendant to be discharged	65
Defendant, if offense committed in another county to be sent there	46	charged proven to hold defendant for trial	66
if offense committed in county to be tried at once	48	if different offense proven, to hold and try him for it	66
on examination of charge, to be committed or held to bail	49	Oral order to arrest	88
may object to magistrate presiding	52	Penalty for issuing warrant in felony without affidavit amendment to	81
time for appearance of, may be extended	59	Riots and unlawful assemblies to be suppressed by	375
spectators may be excluded	63	punishment for failing to suppress	378
to be discharged if offense not proven	65	Shall suppress riots and unlawful assemblies	375
to be held to bail or committed if charge proven	66	recognize witnesses on holding defendant to answer	69
to be held and tried if a different offense proven	66	Subpœnas for witnesses to be issued by	61
Deposit, to fix amount to be deposited in lieu of bail	55	Warrant of arrest may be issued by, when to be issued by	26
to make entry of	56	not to issue for felony until affidavit filed	81
how amount to be deposited determined	60	When he shall issue peace warrant, may require security to keep the peace	383
Drunken and disorderly persons, how disposed of	398		884
Entry of deposit in lieu of bail to be made by	56		

	SECTION.		SECTION.
Magistrate—Continued.		Military—Continued.	
When he shall issue warrant of arrest	81	Under what circumstances may fire on rioters	381
Who are magistrates	26	When governor shall send from one county to another	374
Witnesses may be examined by, to ascertain person guilty of offense	32	and by whom may be called out to suppress riot	379
subpoenas to be issued for	61		
to be separated in examining court	62	Military courts—	
names and residences of to be entered on minutes	64	Offenses in, not prosecuted by indictment	9
to be recognized	69		
Magistrates' courts—		Minutes of examining court—	
Removal of prosecutions to	15	Statements in, not competent evidence	64
See JUSTICES' COURTS.		To contain entry of deposit in lieu of bail	56
Mail—		testimony and names and residence of witnesses	64
Bond for appearance in another county sent by	47	be delivered to clerk of court . .	70
Warrant or bail-bond by, to another county	84		
Malefiance in office—		Misdemeanor—	
Form of judgment in, page 674.		Amount of bail to be indorsed on warrant for	28
Nature of judgment on conviction of	292	Appeal by defendant	347
		time of appealing	348
Marshal—		bond to suspend judgment . . .	349
Peace officer may execute warrants, 26		appeal by Commonwealth	350
Master commissioner—		summons not necessary	351
Not to be taken as bail	80	judgment of acquittal when not reversed	352
Materiality—		attorney fee, taxed on affirmance, damages on affirmance	354 356
See ALLEGATION.		Bail during trial for	184
Of allegation in indictment	127	Commonwealth may appeal	350
Mayor—		County judge may try, page 398.	
Duty of, to suppress riots and unlawful assemblies	375	appeal from judgment, page 398.	
Magistrate, and may issue warrants, 26		Court of Appeals has appellate jurisdiction of	347
Military, may call out to suppress riots and unlawful assemblies, 379		Damages on affirmance	356
Mayors' courts—		Defendant arrested for may give bail	364
Are police courts	321	charged with may give bail during adjournment	55
Mileage—		need not be present during trial for	184
Allowed to jurors from adjoining county	195	may remain on bail during trial for	184
to non-resident witness, see act .	151	Definition of	7
Military—		Failure to assist officer when required is	373
Must obey civil officers	380	to assist peace officer when summoned is	41
Officer may call out when	371	How appeal to be taken in . . .	348, 364
		Judgment to include costs	291
		When to be rendered	283
		Jury permitted to separate during trial	244
		Trial by county judge, page 398.	
		in absence of accused	184

	SECTION.		SECTION.
Misjoinder—		Obtaining money by false pretense—	
Of offenses how corrected	168	May be joined with larceny in indictment	127
Money—		Offense—	
See DEPOSIT IN LIEU OF BAIL.		See PUBLIC OFFENSE.	
Description in indictment for larceny or embezzlement of . .	185	Officer—	
Name—		See PEACE OFFICER.	
Error in indictment as to name of defendant may be corrected .	125	Aid to assist in arresting	41
Form of order for correction of, page 672.		penalty for refusing	41
New trial—		Execution of death warrant, who may suspend	295
Arrest of judgment	275 to 280	Governor may render aid	374
Defined	269	How objection made to, presiding at trial of <i>habeas corpus</i>	418
Effect of granting	270	Interested or related to parties, not to preside at trial of <i>habeas corpus</i>	415
Grounds for	271	Penalty on officer refusing to issue writ of <i>habeas corpus</i>	401
must be in writing and filed with motion	274	Punishment of, for neglecting to suppress riot	378
juror may be examined to show verdict was by lot	272	Resistance to, how overcome . . .	371
Motion for, when must be made . .	273	To what officer writ of <i>habeas corpus</i> shall be returned	416
Not guilty—		What officers may suspend execution of death sentence	295
Effect of plea of	175	Order—	
Pleaded with or without plea of former conviction or acquittal	172	Commitment of, requisites of . . .	67
Notice—		form of, page 661.	
County attorney to, of examining trial	51	how executed	67
Given Commonwealth's attorney of application for return of deposit	88	Owner—	
Form of notice to Commonwealth's attorney, page 659.		When allegation as to owner of property stolen not material .	128
Nuisance—		Panel—	
Execution on judgment for abatement	303	Grounds of challenge to	199
Oath—		How filled	192
Foreman of grand jury may administer	106	Proceedings if challenge to sustained	200
Jury to try issue	217	Papers—	
Jury, if there be no issue	218	Court may compel production of in evidence	152
Officer in charge of jury	245	of Appeals may compel production of on trial of clerk	445
Officer taking bail-bond may administer to bail	77	clerk of, to issue process for production of on such trial	445
Person conducting jury to view place	236	Examining trial in, to be delivered to clerk of court	70
Taken by senators, on trial of impeachment	438	<i>Habeas corpus</i> case in, to be returned to clerk	421
Objection—		Senate may coerce production of in impeachment case	486
To magistrate, presiding as examining court, how made . . 52.	53	clerk of, to issue process for production of in such case	485
officer presiding at trial of writ of <i>habeas corpus</i>	418		

	SECTION.		SECTION
Passing counterfeit money—		Peace officers—Continued.	
And having it in possession may be joined in indictment	127	May break doors to make arrest . .	40
Peace—		summons assistance	41
See SECURITY TO KEEP THE PEACE.		pursue prisoner who escapes anywhere in the State	44
Jurisdiction of justices in breach of	18	execute writ of <i>habeas corpus</i> . . .	406
Peace officers—		execute warrant of arrest	26
Arrest under warrant, how to proceed on	45	Must show warrant of arrest, if required	39
without warrant, how to proceed, may break doors to make	46	Notice to county attorney in examination for felony to be served by	51
may summons assistance to make, not to use unnecessary force in making	41	Prisoner who escapes may be pursued by, anywhere in State . .	44
Assistance summoned by, to arrest .	41	Punishment of for failure to suppress riot or unlawful assemblies	375
Bail, what peace officers may take to receive deposit in lieu of . . .	55	Responsible on his bond for money deposited in lieu of bail	57
to return deposit to defendant if he appear	56	Shall return money deposited, if defendant appear	56
responsible on his bond for money deposited	57	Unlawful assemblies and riots, duty of to suppress	375
Bench warrant, other than sheriff executing, how to proceed . . .	144	Warrant of arrest may be executed by	26
Deposit in lieu of bail to be received by	55	must be shown if required	39
to be returned to defendant if he appear	56	return to be made on, by	38
to be paid to trustee of jury fund when	56	how to proceed on arrest under .	45
responsible on his bond for	57	how to proceed on arrest without, .	46
Disorderly person arrested by . . .	395	What peace officers may take bail .	84
Doors may be broken to arrest . . .	40	When they may make an arrest . .	36
Duty and oath of officer in charge of jury	245	Who are	26
and oath of officer conducting jury to view place	236	Writ of <i>habeas corpus</i> may be executed by	406
to suppress riots and unlawful assemblies	375	to make return of service on . .	408
to arrest insane, drunken or disorderly persons	395	Peace warrant—	
Drunken and disorderly persons, duty of to arrest	394	See SECURITY TO KEEP THE PEACE OR FOR GOOD BEHAVIOR.	
How to proceed on arrest under warrant	45	Penal action—	
to proceed on arrest without warrant	46	Appeals in, regulated by Civil Code, .	355
he may suppress resistance to the execution of process	371	Offenses punishable by fine prosecuted by	11
to proceed on arresting drunken, insane or disorderly person . .	396	Proceedings regulated by Civil Code	11
Insane person may be arrested by .	394	Penalty—	
Jury, duty and oath of, when conducting to view place	236	Execution to issue on	301
duty and oath of officer in charge of	245	ball against	302
Making arrest must notify person of his intention and offense charged	39	For refusing obedience to writ of <i>habeas corpus</i>	409
		refusal of officer to issue writ of <i>habeas corpus</i>	401
		issuing warrant for arrest in felony without affidavit	31
		Imprisonment, execution of judgment	298
		Judgment must fix	284
		Jury to fix, when	258
		Must be affixed in judgment . . .	284

	SECTION.
Penitentiary—	
Defendant, if in penitentiary, shall remain pending appeal . . .	343
but shall be removed upon reversal	344
if again convicted, shall have credit for former confinement	345
Offenses punishable by imprisonment in are felonies	6
Perjury—	
Grand juror responsible for	114
Sufficient, indictment for	184
Person—	
See PRIVATE PERSON.	
Allegation as to person injured is not material, when	128
Released under <i>habeas corpus</i> , not to be imprisoned for same cause, except	422
Petit jury—	
Issues of fact tried by	180
Justices' court in	381, 382
Police court in	319
Selecting	190, 191,
Summoning by sheriff	192
person appointed	198
from adjoining county	194, 196
Pleas—	
See PLEADING.	
Allowed	172
Form of entry of pleas on record, page 671, and	164
Guilty, must be by defendant in person	178
may be withdrawn before judgment	174
Of not guilty, effect of	175
insanity, verdict and proceedings on	268
former acquittal or conviction deemed controverted without reply	179
To indictment are guilty, not guilty and former conviction or acquittal	172
Pleading—	
See PLEAS.	
Acquittal, when bar	176
plea of former	164, 172
Allowed	162
Conviction, plea of former	164, 172

	SECTION.
Pleading—Continued.	
Defendant, put on trial, must move to set aside indictment or plead	157
pleadings on behalf of allowed	162
entered on the record, and may be oral	163
Demurrer, form of	164
want of jurisdiction	166
when proper plea	165
proceedings if sustained	166
overruled may plead	171
Form of entry on record	164
Former acquittal or conviction bar,	179
Judgment, how pleaded	181
May be oral in police or justices' courts	318, 380
None required of Commonwealth on summons on forfeited bail	94
What necessary in pleading judgment or other proceeding	181
pleadings on behalf of defendant allowed	162
When former acquittal or conviction bar	176
Police and city courts—	
Cases may be transferred to by circuit court	15
Change of venue in, page 574.	
Clerk to issue summons upon information	810
to issue subpoenas	815
provisions as to, apply to judge acting as clerk	820
Continuance may be granted by	816
Court may grant continuances	816
Defendant to be tried or held to bail	809
Indictment not necessary in, when,	806
Issues of law and fact, how tried	819
Insane, drunken or disorderly persons arrested to be taken before	396
Judge of is a magistrate	26
may fix terms of court	308
may issue warrant of arrest	312
may issue writ of <i>habeas corpus</i>	399
may require security to keep the peace or for good behavior	885
provisions as to clerk apply to, when acting as clerk	820
Jurisdiction of, offenses	9
offenses may be prosecuted by summons or warrant	10
of generally	13
of local	19
Laws as to Louisville City Court not changed by Code	322
Local jurisdiction of	19
Louisville City Court	322

	SECTION.		SECTION.
Police and city courts—Continued.		Prevention of public offense—Continued.	
May impanel grand jury	307	Suppression of riots and resistance to authority—	
try defendant at once or hold to bail	309	Duty of officers in cases of riots and unlawful assemblies	375
require security to keep the peace or for good behavior	385	Governor may send military aid . .	374
Offenses exclusively within their jurisdiction not indictable	9	How officer may suppress resistance to execution of process . .	371
Pleadings may be oral unless indictment necessary	318	Military must obey civil officers . .	380
Prosecutions in, when stand for trial	313	when and by whom they may be ordered out	379
Provisions of Title VI. so far applicable apply to	317	under what circumstances they may fire on mob	381
as to clerk apply to judge acting as clerk	320	Officer may arrest resisters and their aiders and abettors	371
Security to keep the peace or for good behavior required by	385	must also report them to court . .	372
Subpenas to be issued by clerk of . .	315	penalty for refusing to assist officer	373
Summons, offenses not indictable prosecuted by warrant	10	duty of officer in case of riots and unlawful assemblies	375
clerk to issue upon information on oath	310	rioters not dispersing to be arrested	376
Summons in, how executed	314	Punishment of persons failing to aid officer	377
nature of	311	of officer neglecting to suppress riot	378
Time prosecutions stand for trial . .	318	Riots, duty of officer to suppress	375, 378
Transfer of cases from circuit court to	15	Rioters not dispersing on command to be arrested	376
Warrant, offenses not indictable may be prosecuted by	10	Under what circumstances military may fire on mob	381
judge may issue	312	When and by whom military may be ordered out	379
What courts are police courts	321	Arrest of insane, drunken or disorderly persons—	
Witnesses' attendance, how secured, .	315	Magistrate to dispose of insane person brought before him	397
Policeman—		to dispose of drunken or disorderly person	398
Not to receive deposit in lieu of bail, Peace officer, and may execute warrants	26	Peace officer to arrest insane or drunken persons	394
Polling the jury—		also disorderly persons	395
Either party may have jury polled, .	267	duty of, upon making such arrest, .	396
What it consists of	267	Prisoner—	
Postponement of trial—		Escaping may be pursued and recaptured	44
Causes for	188, 189	Removal from jail or custody of public officer	425
Pregnancy—		Prisons—	
Cause for suspending execution of judgment of death	296	Grand jury to inquire into condition and management of	102
Prejudicial errors—		Private person—	
Substantial are	340	Arrest by	35, 37
Presumptions—		Has same powers as sheriff in executing writ of <i>habeas corpus</i> . .	427
Of law and fact judicially noticed, need not be alleged	130		
Prevention of public offense—			
See SECURITY TO KEEP THE PEACE.			
Nature of proceedings to prevent commission of offenses	12		

	SECTION.		SECTION.
Private person—Continued.		Public offense—Continued.	
May be appointed to summon jurors, 198		Committed in part in different coun-	
be appointed to serve writ of		ties may be prosecuted in	
<i>habeas corpus</i> 406		either 21	
Must make return of service 408		Conviction may be of offense	
		charged, although higher de-	
		gree proven 265	
Process—		Degrees of the same offense, what	
Bench warrant, form of 142		are 268	
indorsement to be made on as to		what offenses are included in one	
bail 148		charge 264	
how officer other than sheriff exe-		Definition of 4	
cuting shall proceed 144		Dismissal of indictment will not	
court may order in any case . . . 149		bar 178	
if offense not bailable may issue, 145		Divided into felonies and misde-	
process of arrest is 189		meanors 5	
Court to order on finding indict-		Duty of grand juror to disclose of-	
ment 141		fenses 104	
may order a bench warrant in any		Felonies and misdemeanors 5	
case 149		Grand jury to inquire into and in-	
Indorsement on bench warrant as to		dict 102	
bail 148		Indictable offenses 9	
Of arrest, is a bench warrant . . . 139		Indictment gives jurisdiction to cir-	
On indictment, of what it consists . 188		cuit court 14	
Summons on indictment, form of . 146		Penal action may be prosecuted by,	
how issued and served 147		Person charged with may be im-	
only to issue in misdemeanors . . 148		mediately arrested 8	
Prohibition—		Prevention of 12	
Circuit court may restrain inferior		Proceedings for prevention of . . . 12	
courts by writ of 24		if offense appear to have been	
Prosecution—		committed out of jurisdiction	
Barred by former acquittal or con-		of court 280	
viction 176		if person in whose behalf writ of	
by penal action 11		<i>habeas corpus</i> is issued, guilty	
How to be docketed 186		of 428	
Prosecutions by summons or war-		Prosecution by penal action 11	
rant in inferior courts 10		summons or warrant 10	
When they stand for trial 187		What offenses may be prosecuted	
dismissal of indictment not bar . 178		by summons or warrant 10	
Prosecutor—		may be prosecuted by penal ac-	
Failing to appear in peace warrant		tion 11	
defendant to be discharged 889		are degrees of the same offense . 268	
Impeachment liable for costs if de-		offenses are included in one	
fendant acquitted 441		charged 264	
Information against clerk, liable for		may be joined in an indictment . 127	
costs 448			
Necessary upon information against		Quashing indictment—	
a clerk 443		Proceedings upon quashing 288	
not necessary when 449		When courts should quash 283	
Required to secure costs 447			
Public offense—		Reasonable doubt—	
See PREVENTION OF PUBLIC OF-		As to grade offense, conviction	
FENSE.		should be of lower grade 239	
Acquittal or conviction bars further		Of guilt, entitles defendant to ac-	
prosecution 177		quittal 238	
But one to be charged in indict-		Receiving stolen property—	
ment except 126		May be joined with larceny in in-	
		dictment 127	

	SECTION.		SECTION.
Recognizance—		Return—Continued.	
Bail, form of, recognizance of, page 658.		<i>Habeas corpus</i> , return of papers used on trial of	421
Of witnesses by examining court on holding defendant for trial . .	69	when time for return of, may be changed	408
Security to keep the peace may be by	398	Warrant of arrest, made by officer executing it	33
Witnesses, form of recognizance of, page 656.		return to a different county by mail	34
Records—		Riots and unlawful assemblies—	
Form of entry of pleadings on . .	164	Duty of certain officers to suppress, Justice of the peace, jurisdiction of in	375 18
Of county, subject to inspection of grand jury	108	Military, when may be called out to suppress	379
Pleadings must be entered of record, .	163	must obey civil officers	380
Religious association—		may fire on rioters, when	381
Writ of <i>habeas corpus</i> may be issued against	424	Officers punishable for neglecting to suppress	378
Removal of clerks from office—		duty of, to suppress	375
Causes of removal	442	persons failing to aid, to be punished	377
Continuances	446	Persons failing to aid officer to be punished	377
Costs against unsuccessful party . .	448	Rioters not dispersing shall be arrested	376
security for	447	when military may fire on	381
Court of Appeals has jurisdiction of	13	when and by whom military may be called out	379
may remove upon information . .	442		
what the information must state, .	443		
may appoint a clerk pending trial to act in trial	450		
Evidence, production of, how coerced	445	River—	
Information by attorney-general . .	443	Bounding two counties, jurisdiction over	20
what information must state . . .	443		
Prosecutor, in what cases necessary, in what cases not necessary . . .	448 449	Robbery—	
Summons, how issued and served .	444	Offenses that may be joined with in indictment	127
Trial, time of	444		
Repeal—		Routs—	
Code repeals all laws within its purview	8	Jurisdiction of justices' courts in . .	18
Replevy—		Sanity—	
Fine may be replevied	305	Trial of sanity of defendant	156
		Verdict and proceedings on plea of insanity	268
Reply—		Security to keep the peace or for good behavior—	
No reply necessary	179	Bond of defendant, what are breaches of	391
Resistance to execution of process—		proceedings upon breach of	392
How punished	871, 872	Form of, pages 661, 662.	
Return—		may be by recognizance	393
<i>Habeas corpus</i> , of writ of	408	breaches of, what are	391
what defendant must state in his return	410	proceedings when broken	392
to what officer writ of shall be returned	416	return of to circuit court	386
		grounds for requiring	382
		Causes for which security may be required	382

SECTION.	SECTION.
Security to keep the peace or for good behavior—Continued.	Setting aside indictment—Continued.
Commitment for failure to give, 884, 887	Proceedings on setting aside . . . 159
who may take security after . . . 888	defendant discharged unless next
form of order of, page 662.	grand jury indict 160
Defendant discharged if prosecutor	Sheriff—
fail to appear 889	See PEACE OFFICER.
discharged if no grounds for ap-	Bail of person arrested may be
prehension appear 890	taken by 28, 88
Form of bonds to keep the peace,	taking bail shall fix time for de-
pages 661, 662.	fendant's appearance 29
of order of commitment, upon	bond shall be delivered by to
failure to give, page 662.	proper officer 82
Justices' court may require security	may administer oath to bail . . . 77
pending adjournment 825	sheriff or deputy not to be taken
Magistrate may require security of	as 80
disorderly persons 898	in what cases sheriff or his deputy
Peace warrant, how arrest may be	may take 88
ordered on 888	defendant arrested on bench war-
Proceedings upon breach of bond . . 892	rant shall be taken before, to
Security may be by recognizance . . 892	give 144
for what causes may be required,	Court may appoint person to sum-
justices' court may require pend-	mon jurors 198
ing adjournment 825	Defendant, sheriff taking bail of,
commitment for failure to give,	shall fix time of appearance
884, 887	of 29
who may take after commitment,	arrested on bench warrant shall
magistrate may require of dis-	be taken before sheriff to
orderly person 898	give 144
time for which may be required . . 885	Judgment, to make written return
Time for which security may be re-	of execution of 300
quired 885	of imprisonment, how to execute . . 298
Trial before magistrate when he	of death, how and when to exe-
should require bond 884	cute 294
and requiring bond in circuit	in what cases he may suspend
court 887	execution of 296
Senate of Kentucky—	Jurors, shall summon to fill panel . . 192
Has jurisdiction of impeachments, 18	court may appoint another per-
Jurisdiction of extends throughout	son to summon 198
State 17	may be summoned from adjoin-
Shall appoint a day for hearing im-	ing county 196
peachment 484	Jury, to make provisions for while
compel obedience to process for	kept together 247
evidence 485, 486	May take bail of person arrested . . 23
determine what absence prevents	summon jurors from adjoining
senator from voting 489	county 196
Senator—	Military, may be called out by,
Oath on trial of impeachment . . . 488	when 871, 879
What absence will prevent, from	Peace officer, and may execute war-
voting on impeachment . . . 489	rant 26
Setting aside indictment—	Powers of while conveying prisoner
Form of order setting aside, and	to penitentiary 298
resubmitting to jury, page 672.	Sheriff or deputy not to be taken as
Grounds on which it may be done . . 158	bail 80
Motion to set aside overruled, de-	in what cases he or deputy may
fendant must plead 161	take bail 28, 88
	defendant arrested on bench war-
	rant taken before to give
	bail 144
	may administer oath to bail . . . 77
	taking bail, to fix time for de-
	fendant's appearance 29

	SECTION.		SECTION.
Sheriff—Continued.		Summons—Continued.	
Sheriff may take bail of person		Clerk police court to issue upon in-	
arrested for misdemeanor . . .	28	formation on oath	310
shall deliver bond to proper offi-		nature and form of such sum-	
cer	82	mons	311
Warrant may be executed by . . .	26	upon information against, how is-	
		sued and served	444
Sickness—		<i>Form of, page 652.</i>	
Effect of sickness of juror . . .	250, 251	of on indictment	146
		of on forfeiture of bail-bond . . .	94
Special verdict—		How to be executed	314
Defined	259, 260	Impeachment on, how issued and	
General or special	256	served	434
Spectator—		Indictment, form of summons on .	146
May be excluded from examining		summons on	188
court	68	Issual and service of	147
Statement of case—		Justices' courts from	326
Commonwealth for	220	Misdemeanor cases in	148
Defendant for	222	Not necessary on appeal to Court of	
Statutory offenses—		Appeals	851
Indictment need not pursue words		Offenses that may be prosecuted by,	10
of statute	136	Only to be issued in misdemeanors,	148
Subornation of perjury—		Police courts from	310, 311
What sufficient in indictment for .	184	how executed	314
Subpoena—		What offenses may be prosecuted	
Clerk of trial court to issue on re-		by	10
quest of either party	160	When justice shall issue	326
to issue for witnesses before		Sunday—	
grand jury	106	Writ of <i>habeas corpus</i> may be issued	
of city or police court to issue . .	816	on	427
of Senate shall issue upon trial of		Supersedeas—	
impeachment	486	Forms of, pages 675, 676.	
of Court of Appeals shall issue		Supersedeas bond—	
upon information against		Forms of, pages 675, 676.	
clerks	445	On appeal in misdemeanors to sus-	
<i>Duces tecum</i> may be issued	152	pend execution	349
Forms of, pages 654, 655.		Required to suspend execution on	
Justice to issue in his court	329	appeal to circuit court	364
Magistrate may issue for examining		Suppression of riots—	
court	61	Provisions as to	375 to 380
Officer granting or trying writ of		Surrender of defendant—	
<i>habeas corpus</i> may issue	414	Bail may arrest defendant or have	
		him arrested	87
Subpoena duces tecum—		indorsement by bail on bond to se-	
May be issued	152	cure arrest, page 659.	
Summons—		may surrender defendant and dis-	
Bail-bond, to be issued on forfeiture		charge bond	86
of	94	Jailer must give written acknowl-	
form of, on forfeiture, page 652.		edgment of surrender	86
		form of acknowledgment, p. 659.	
		May be made by himself or bail,	
		and discharges bond	86
		Money deposited to be returned	
		upon	88

Testimony—	SECTION.
See EVIDENCE—WITNESS.	
Defendant may testify, see act . . .	228
Of accomplice not to convict unless corroborated	241
non-resident witness for Commonwealth, how procured, see act	151
Process for production of, in impeachment cases	285, 286

Time—	
Allegations as to, in indictment . .	129
Appeals in Court of Appeals, of trial	358, 359
to circuit court, for taking . . .	369
Clerks, of trial of, on information against	444
Code, when took effect	1
Defendant's appearance, fixed by sheriff taking bail-bond . .	29
appearance in examining court . .	59
effect of defect in bail-bond as to time for appearance	85
Habeas corpus, for return may be changed	408
Indictment, when trial at term when found	185
Judgment, when should be rendered	283
Security to keep the peace, time for which may be required . . .	385
Trial, when prosecutions stand for, when may be at same term as indictment	187
in city or police courts	185
of appeals in Court of Appeals,	358, 359
of information, against clerk . . .	444

Trial—

See TRIAL BY JURY.	
Arraignment. See ARRAIGNMENT.	
Bail, before whom to be had if examining court refuse	426
City or police courts, time of, in . .	318
Clerks, time of trial of information against	444
Continuance of regulated	189
Defendant, of sanity of	156
must be present during trial for felony	183
may remain on bail until case submitted	183
need not be present during trial for misdemeanor	184
on bail during trial for misdemeanor	184
joint, in felony case entitled to separate trials	237

Trial—Continued.

Felony, defendant must be present during trial for	183
defendant may remain on bail until case submitted	183
Form of order for removal of defendant to another county, page 672.	
of order if offense committed out of this State	281
Habeas corpus, under writ of	420
Indictment, when may be at same term as found	185
Issues of law and fact, by whom tried	180
Joint defendants in felony, separate trials	237
Misdemeanor, defendant need not be present during trial . . .	184
on bail during trial for	184
Offenses within jurisdiction of magistrate, trial of	48
Postponement regulated	189
Proceedings if offense committed out of jurisdiction of court .	230
form of order in such case, page 672.	
if offense committed out of State, form of order in such case, page 672.	
if higher degree of offense proven,	232
Prosecutions, when stand for trial, may be postponed for cause . .	187
postponement regulated	188
Quarterly court, trial of misdemeanors in, see act	189
Sanity, trial of	25
Time of, in city or police courts . .	156
of trial of information against clerk	318
When trial may be at same term as indictment	444
prosecutions stand for	185
	187

See Arraignment.

Defendant.

Evidence.

Jury.

Pleadings.

Public Offense.

Time.

Verdict.

View.

Trial by jury—

Adjournment of court during . . .	253
final discharges jury	254
Admonition to jury at adjournment,	246
Argument, order of	227, 228

Trial by jury—Continued.

	SECTION.
Challenge to panel	197
individual juror to	197
grounds of to panel	199
proceedings if sustained	200
peremptory	201
causes for	201, 207, 208
when to be made	202
number allowed defendant	202
Commonwealth	204
general causes for	207
actual bias	209
implied bias	210
examination of jurors upon	213, 214
exemption from service not ground for	211
order in which to be made	215, 216
court to hear and decide	212
Continuance of	189
Court open while jury deliberating,	253
Disagreement of jury proceedings	251
Discharge of jury, causes for	251
Docketing cases for trial	186
Evidence, introduction of	221, 223
rebutting	224
jury informed as to after retiring,	249
Indictment to be read	219
Instructions	225
jury to withdraw during agree- ment on	226
Joint defendants, to have separate trials	237
testimony of	234
Jury to be kept together	244
lodging and board for	247
oath of officer in charge of	245
Misdemeanors of, page 398. appeal in cases, page 398.	
New trial defined	269
effect of	270
grounds for	271
Oath to jury	217, 218
Papers and things as evidence de- livered to	248
Pay of jurors from adjoining county,	195
Plea to be stated	219
Reading of indictment to jury	219
Reasonable doubt, acquittal	238
as to degree, conviction of lower	239
Retrial of case	252
Sickness of juror, jury dis- charged	250, 251
Statement of case to	220, 222
Verdict, general or special	256, 258
special requisites of	259 to 261
by lot forbidden	271
insanity, proceedings	268
polling jury	267
rendition of	255

Trustee of jury fund—

After forfeiture, shall enter money deposited to credit of jury fund	97
Money may be deposited with him in lieu of bail	89
shall give a certificate of deposit, Money, form of certificate of de- posit of, page 659.	89
liable for money deposited with him	91
Shall give a certificate of deposit	89
form of certificate, page 659. hold deposit subject to order of court	91
To pay expenses of jury while kept together, and deduct from their pay	247

Unlawful assemblies—

Provision as to 375 to 380

Unsound mind—

Is cause of challenge to juror	207
May be shown by defendant, as cause why judgment should not be rendered	287

See Insanity.

Insane person.

Sanity.

Venue—

See CHANGE OF VENUE.	
Change of, see page 575.	
Libel for	21
Prosecutions for	21

View—

How view conducted	236
Jury may have view of place at which a material fact oc- curred	236

Verdict—

Conviction may be of degree, offense	262
Court always open to receive	253
may discharge jury without, when	251
General, defined	257
How rendered	255
Insanity, verdict and proceedings on,	268
Juror examined to show it was by lot	272
Jury to fix penalty in, unless fixed by law	258
may return verdict as to all or any of several defendants	266
May be general or special	256

	SECTION.		SECTION.
Verdict—Continued.		Witness—Continued.	
Polling jury	267	Defendant may testify in his own behalf	228
Rendition of	255	Depositions in what cases may be taken	158
Special defined	259	Fees of, need not be tendered to	151
requisites of	260	of non-resident witness summoned by Commonwealth, see act	151
not to be received unless sufficient according to sec. 260	261	Foreman of grand jury may administer oath to	106, 108
That verdict was by lot may be shown by juror	272	Grand juror may be compelled to disclose testimony	118
Verdict may be general or special, and proceedings on plea of insanity	256	Grand jury, names of examined before to be written on indictment	120
When court may discharge jury without	268	attorney for Commonwealth may examine	109
	251	attendance before may be coerced, foreman of may administer oath to	106, 108
Warrant of arrest—		<i>Habeas corpus</i> , officer trying may coerce attendance	414
See BENCH WARRANT — PEACE WARRANT.		If two be required and not produced, court should instruct to acquit	242
Execution of	26	Joint defendants competent witness, Juror may be examined on challenge of	284
<i>Form of</i> , pages 658, 654.		Justices' courts in	214
How officer arresting under shall proceed	45	Magistrate may summon to ascertain person guilty of public offense	829
If to a different county, return of may be by mail	34	may coerce attendance of in examining court	32
Issual of	26	May be examined on challenge of juror	61
Judge of city or police court may issue	312	May be examined on challenge of State	214
Justices of the peace, when shall issue	826, 827	Names and residence of, in examining court to be stated in the minutes	151
Magistrate, when shall issue	81	No compensation need be tendered to	151
penalty for issuing in felony without affidavit	81	Non-resident, fees to be paid to by Commonwealth	151
Misdemeanor for, to have amount of bail indorsed on	28	Officer trying writ of <i>habeas corpus</i> may compel attendance	414
Nature and form of warrant	26	Police courts, from	815
Police courts from	812	Privileges and pay of, in impeachment cases	487
Return to be made by officer executing	38	Recognizance of, by examining court	69
what to state	38	Senate may coerce attendance of clerk of, to issue process for in impeachment case	426
Warrant must be shown to person arrested if he require it	89	Separation of on examining trial	435
What offenses may be prosecuted by, Who may issue and execute	10, 26	Subpoena <i>duces tecum</i> for	62
When justice of the peace shall issue	826, 827	Witnesses may be summoned from any part of State	152
			151
Witness—			
Attendance of coerced according to Civil Code	151		
coerced by magistrate in examining trial	61		
before grand jury	106		
Attorney for Commonwealth may examine before grand jury	109		
Clerk of Senate to issue process for in impeachment cases	435		
of Court of Appeals may issue process for on trial of clerk	445		
Compensation need not be tendered to	151		
Court of Appeals may coerce attendance of, on trial of clerk,	445		

	SECTION.		SECTION.
Words—		Written instruments—	
Construction of, used in indictment	137	See EVIDENCE.	
Used in statute need not be followed in indictment	136	Clerk of Senate to issue process for production of in impeachment	435
Writ—		Comparison of, see act Civil Code, sec. 604.	
See HABEAS CORPUS.		Court may compel the production of in evidence	152
Of prohibition from circuit to inferior courts	25	Jury to take, when put in evidence,	248
What writ to issue upon indictment	138	When misdescription of will not vitiate indictment	133

